No. 98-1811-CFX Title: Alexis Geier, et al., Petitioners
v.
American Honda Motor Company, Inc., et al.

Docketed: May 10, 1999 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	May 5 1999	Petition for writ of certiorari filed. (Response due July 9, 1999)
	May 17 1999	Order extending time to file response to petition until July 9, 1999.
	Jul 9 1999	Brief of respondents American Honda Motor Co., Inc., et al. in opposition filed.
	Jul 16 1999	Reply brief of petitioners Alexis Geier, et al. filed.
	Jul 21 1999	DISTRIBUTED. September 27, 1999
	Sep 10 1999	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday October 22, 1999. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 19, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 30, 1999. Rule 29.2 does not apply. SET FOR ARGUMENT December 7, 1999. **********
	Oct 20 1999	Brief amicus curiae of Attorneys Information Exchange filed.
	Oct 21 1999	Record filed.
	Oct 21 1999	Record filed.
	Oct 22 1999	Blanket CONSENT for the filing of all amicus briefs received from counsel for the petitioners and counsel for the respondents.
	Oct 22 1999	Joint appendix filed.
	Oct 22 1999	Brief of petitioners Alexis Geier, et al. filed.
	Oct 22 1999	Brief amici curiae of Robert LeFlar, Robert Adler, Michael Green, and Joseph Page filed.
	Oct 22 1999	Brief amici curiae of National Conference of State Legislatures, et al. filed.
	Oct 22 1999	Brief amici curiae of Missouri, et al. filed.
	Oct 22 1999	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Oct 22 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Nov 4 1999	CIRCULATED.
	Nov 8 1999	Brief amicus curiae of United States filed.
	Nov 15 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 19 1999	Brief of respondent American Honda Motor Co.,Inc., et al. filed.
	Nov 19 1999	Brief amicus curiae of Chamber of Commerce of the United States filed.

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No. 98-1811-CFX

Entry	Date	Proceedings and Orders
	Nov 19 1999	Brief amicus curiae of General Motors Corporation filed.
	Nov 19 1999	Brief amicus curiae of Defense Research Institute filed.
	Nov 19 1999	Brief amicus curiae of Washington Legal Foundation filed.
	Nov 19 1999	Brief amicus curiae of Product Liability Advisory Council, In.c filed.
	Nov 19 1999	Brief amicus curiae of Blue Cross Blue Shield Association filed.
	Nov 19 1999	Brief amici curiae of Alliance of Automobile Manufacturers, et al. filed.
	Nov 19 1999	Brief amicus curiae of Business Roundtable filed.
	Nov 30 1999	Reply brief of petitioners Alexis Geier, et al. filed.
	Dec 7 1999	ARGUED.

Supreme Court, U.S.
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No. 98-_____

IN THE

Supreme Court of the United States

Alexis Geier, *et al.*,

Petitioners,

v.

American Honda Motor Company, Inc., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the District of Columbia Circuit erred by holding, in direct conflict with five state courts of last resort, that an automobile manufacturer's compliance with a Federal motor vehicle safety standard that permits, but does not require, installation of airbags in passenger vehicles preempts state common law claims that an automobile was defectively designed because it lacked an airbag?

2. Whether the D.C. Circuit erred by holding that, because this Court engaged in implied preemption analysis in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), the lower courts are free to disregard the limitations on implied preemption most recently emphasized in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), to find that a Federal motor vehicle safety standard promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431, *impliedly* preempts common law claims, even though the Act *expressly* provides that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law"?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioners Alexis Geier, William Geier, and Claire Geier (as appellants) and respondents American Honda Motor Company, Inc., Honda of America Manufacturing, Inc., and Honda Motor Company, Ltd. (as appellees).

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OPINIONS BELOW

The opinion of the court of appeals (App. 1-16) is reported at 166 F.3d 1236. The order of the district court granting defendants' motion for summary judgment (App. 17-21) is not reported.

JURISDICTION

The court of appeals entered judgment on February 5, 1999. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The National Traffic and Motor Vehicle Safety Act of 1966, as codified when the vehicle at issue in this case was manufactured, provided in pertinent part:

> **15 U.S.C. § 1392(d). Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or state governments.** Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision

thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * * *

15 U.S.C. § 1397(k). Continuation of common law liability. Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

On July 5, 1994, Congress recodified the Act "without substantive change" (Pub. L. No. 103-272, 108 Stat. 745, 941). The new Code provisions, in relevant part, are as follows:

49 U.S.C. § 30103. Relationship to other laws.

(b) Preemption. (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by

the otherwise applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

* * * *

(e) Common Law Liability. Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

All of the applicable preemption cases, including the decisions by the two courts below, discuss the provisions as codified before the 1994 recodification. This petition, therefore, uses the citations employed in those decisions.

STATEMENT OF THE CASE

On January 16, 1992, Alexis Geier was operating a 1987 Honda Accord in the District of Columbia. Ms. Geier was wearing the manual three-point lap belt and shoulder harness provided for the driver in the design of the car. Rounding a curve, the vehicle spun out of control and collided with a tree. Despite the fact that she was wearing the available lap belt and shoulder harness, Ms. Geier sustained grievous and serious head injuries. *See* App. 2; Complaint ¶¶ 4-7, 18-21.

When the 1987 Honda Accord at issue in this case was manufactured a federal regulation promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* ("the Safety Act") – *i.e.*, Federal Motor Vehicle Safety Standard 208 – gave Honda the option to install

airbags in its car. *See* 49 C.F.R. § 571.208. Specifically, for cars manufactured between September 1, 1986, and September 1, 1987, Standard 208 required Honda, at a minimum, to install some form of passive restraint in a specified percentage of its cars and to install at least a manual three-point lap belt and shoulder harness in the remaining percentage. *Id. See also* App. 3. It also allowed all manufacturers to do more than the bare minimum required (including installing both an airbag and a manual three-point lap belt and shoulder harness in all cars).[1]

On January 12, 1995, Ms. Geier and her parents filed this lawsuit seeking damages under the common law of the District of Columbia against respondents American Honda Motor Company, Inc., Honda of America Manufacturing, Inc., and Honda Motor Company, Ltd. (collectively, "Honda") on theories of negligence, breach of warranty, and strict product liability. The Geiers alleged that the 1987 Honda Accord was negligently and defectively designed and that, if the car had contained a driver's-side airbag in addition to the manual lap belt and shoulder harness, Ms. Geier would not have been seriously injured in the crash.

Even though the design advocated by petitioners was fully consistent with Standard 208, Honda moved for summary judgment on the ground that the Geiers' claims were preempted by the Safety Act and Standard 208. App. 17. In response, petitioners pointed out, *inter alia*, that the Safety Act explicitly

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[1] As the lower court observed, the requirements of Standard 208 have since become more stringent. After September 1, 1989, car manufacturers had to install either an airbag or an automatic seatbelt that would signal the driver with a warning light if the belt became unhooked. App. 3. Currently, passenger cars manufactured after September 1, 1997, must have "an inflatable restraint system at the driver's and right front passenger's position." App. 3.

provides that "[c]ompliance with any Federal motor vehicle standard . . . does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). On December 10, 1997, however, the district court found that petitioners' claims were preempted on the theory that a jury verdict in their favor might establish a safety standard that was not identical to Standard 208. App. 17-20.

The court of appeals affirmed. App. 1-16. In its decision, the court first acknowledged that any conclusion that petitioners' claims are expressly preempted would be "problematic" in light of both the Act's "broadly worded savings clause" and the strong presumption against finding express preemption of common law claims when Congress' intent to preempt "is not clear from the statute's language." App. 10-11. Given the broad wording of the savings clause, the court reasoned, "it would be difficult to discern a 'clear and manifest purpose of Congress' to preempt a design defect claim based on the absence of an airbag." App. 11 (citations omitted).

The court of appeals ultimately decided that it need not resolve the express preemption question, however, since it found instead that petitioners' claims are *impliedly* preempted because they conflict with the regulatory framework established by Standard 208. App. 12. The court first rejected petitioners' claim that, under *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Safety Act's express provisions addressing the scope of preemption bar any inquiry into implied preemption. After acknowledging that *Cipollone* does contain language to that effect (App. 12), the court held that this Court's subsequent decision in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), repudiated *Cipollone*'s apparent holding that implied preemption may not be considered in cases where – as here – the statute itself expressly defines the scope of preemption. App. 12-13.

The court went on to hold that petitioners' claims are impliedly preempted on the ground that they conflict with federal law. While conceding that Standard 208 "does not mandate or forbid the use of airbags" (App. 14), the court adopted Honda's argument that imposition of common law liability for failure to install an airbag would interfere with the federal government's decision to make airbags only "one of several options car manufacturers could choose to comply with the passive restraint requirement of Standard 208 . . .." App. 15. Creation of these options, the court reasoned, was integral to the federal government's policy "of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." App. 15. Because common law liability for failing to install an airbag could "interfere with the regulatory method" embodied in Standard 208, the court concluded that petitioners' claims are "implicitly pre-empted" by the Act. App. 16.

REASONS FOR GRANTING THE WRIT

When Congress enacted the Safety Act in 1966, it unequivocally stated the preemptive effect that compliance with a Federal safety standard was to have on common law liability: "Compliance with *any* Federal motor vehicle safety standard issued under this subchapter does not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added). The D.C. Circuit's preemption decision contravenes these plain words and conflicts with the ruling of five state courts of last resort to address this preemption issue. The lower court's ruling also demonstrates, and increases, the confusion created by this Court's decision in *Myrick* about the Safety Act's preemptive effect. Finally, the decision below incorrectly answers an important federal question that has not been, but should be, decided by this Court: whether Congress intended the Safety Act to preempt state common law claims.

This Court should grant review to resolve the conflict among the federal courts of appeal and state courts of last resort, eliminate the confusion caused by *Myrick*, and decide whether Congress' words mean what they say.

1. The Decision Below Conflicts With the Decisions of Five State Courts of Last Resort.

The Court of Appeals' decision expands and exacerbates the growing conflict among the federal courts of appeals and the state courts of last resort over the Safety Act's preemptive effect with respect to claims that an automobile is defective because it lacks an airbag. Only this Court can bring the conflict to an end. If this Court does not step in, the conflict will only get worse, as the decision below reflects.

To date, five federal courts of appeals and two state courts of last resort have held that common law claims based on the absence of an airbag are preempted by federal law. *See Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 519 U.S. 814 (1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990);[2] *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Cellucci v. General Motors Corp.*, 706 A.2d 806 (Pa.

[2] As the lower court noted, "[t]he Eleventh Circuit recently reaffirmed *Taylor*. In *Irving*, the court noted that although its decision in *Myrick v. Fruehauf Corp.* stated that *Taylor* had been abrogated in part, *see* 136 F.3d at 767 n.1 (citing *Myrick*, 13 F.3d 1516, 1521-22 (11th Cir. 1994)), subsequent Supreme Court precedent made clear that '*Taylor* is correct and can be used for evaluating pre-emption of state law.' *Id.*" App. 7.

1998); *Cooper v. General Motors Corp.*, 702 So.2d 428 (Miss. 1997).

In each of these cases, as here, "Standard 208 did not require airbags for the model-year cars in question, but presented them as one of several options from which manufacturers could choose." App. 7. And, with the exception of the Ninth Circuit in *Harris* (which found express preemption of no-airbag claims), in each case, as here, the court concluded that the plaintiffs' claims were impliedly preempted because they conflicted with federal law.[3]

These decisions are flatly contrary to the holdings of five state courts of last resort that the Safety Act does *not* preempt no-airbag claims. First, in 1995, the New Hampshire Supreme Court unanimously held in *Ford Motor Co. v. Tebbetts*, 665 A.2d 345 (N.H. 1995), *cert. denied*, 516 U.S. 1072 (1996), that the Safety Act expressly preserves all common law claims; that Congress' plain words preclude any finding of implied preemption; and that auto manufacturers can therefore be sued under common law for defective designs that lacked airbags.

Later the same year, in *Wilson v. Pleasant and General Motors Corp.*, 660 N.E.2d 327 (Ind. 1995), the Supreme Court of Indiana agreed in all respects – and held that, even if implied preemption could be reached, there is no conflict between a no-airbag claim and Standard 208 because, *inter alia*, "[Standard]

[3] In *Cooper*, the Mississippi Supreme Court stated in *dicta* that there might be express preemption as well, but it ultimately decided the case on implied preemption grounds. *See* 702 So.2d at 434. ("In the case sub judice, there appears to be both express preemption, under § 1392(d), and implied preemption . . . [but] this Court will filter this case through an implied preemption grid.").

208 does not prohibit airbags – it only permits some other alternatives." *Id.* at 337.

Since that time, the Supreme Court of Arizona, the Supreme Court of Ohio, and the New York Court of Appeals have all followed suit, holding that an automobile manufacturer may be sued for failure to install airbags in its vehicles. *See Munroe v. Galati*, 938 P.2d 1114 (Ariz. 1997) (finding no express or implied preemption of no-airbag claim); *Minton v. Honda of America Mfg., Inc.*, 684 N.E.2d 648 (Ohio 1997) (same); *Draitel v. Toyota Motor Corp.*, 699 N.E.2d 376 (N.Y. 1998) (same).

Thus, there is a deep split among a host of federal and state courts of last resort regarding the precise question presented in this case: whether a manufacturer may be sued for failing to install airbags in one of its vehicles.[4] Notably, virtually all of these courts agree that there could be no *express* preemption of common law claims under the Safety Act.[5] This

[4] The lower federal courts and state trial and appellate courts are also deeply split on this issue. *See generally Cellucci*, 706 A.2d at 812 n.4 (collecting cases); *Cooper v. General Motors Corp.*, 702 So.2d at 433-34 (same).

[5] As noted above, the only exception among the federal courts of appeals is the Ninth Circuit's decision in *Harris*, 110 F.3d at 1416, holding express preemption of no-airbag claims. There is also *dicta* to that effect in the Mississippi Supreme Court's decision in *Cooper*, 702 So.2d at 434. *See* n.3, *supra*. We note, however, that a number of state and federal lower courts have held that there is express preemption of no-airbag claims. *See generally Cellucci*, 706 A.2d at 812 n.4 (collecting cases). In a different context, the U.S. Court of Appeals for the Seventh Circuit has recently held that common law claims involving a defective windshield are expressly preempted by the Safety Act. *See Garcia v. Volvo Europe Truck, N.V.*, 112 F.3d 291, 297 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 697 (1998). The Supreme Court of Idaho has also concluded that the Safety Act expressly

is not surprising, given that the Act's savings clause explicitly provides that "[c]ompliance with any Federal motor vehicle standard . . . does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). As the New York Court of Appeals stated in *Drattel*, this language "potently and pointedly negates any lingering notion of express preemption of state common-law claims." 699 N.E.2d at 382.

These courts differ, however, over the extent to which no-airbag claims are *impliedly* preempted by virtue of a conflict with federal law. Five state courts of last resort have held that, in view of the Safety Act's remarkably clear savings clause, it is unnecessary to even reach the question of implied preemption. *See Tebbetts,* 665 A.2d at 348; *Munroe*, 938 P.2d at 1117-18; *Minton*, 684 N.E.2d at 658; *Drattel*, 699 N.E.2d at 382-83; *Wilson*, 660 N.E.2d at 334-36. In these courts' view, Congress' plain words on the subject are both the beginning and end of the matter: the Safety Act does not under any circumstance preempt common law claims.[6]

On the other hand, four federal appellate courts and two state supreme courts have either rejected or failed even to consider the possibility that the Act's express language prohibits any inquiry into implied conflict preemption. App. 12-13; *Montag*, 75 F.3d at 1417; *Pokorny*, 902 F.2d at 1122;

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preempts a claim that a car is defectively designed because it lacks a lap belt. *See Zimmerman v. Volkswagen of Am., Inc.*, 920 P.2d 67, 72 (Idaho 1996), *cert. denied*, 117 S. Ct. 1245 (1997). These decisions are in direct conflict with all of the other cases cited herein – including the decision below – that reject the argument that the Safety Act expressly preempts common law claims.

[6] With the exception of *Tebbetts*, 665 A.2d 345, each of these cases went on to hold that, in any event, there could be no finding of implied preemption because no-airbag claims do not conflict with federal law.

Taylor, 875 F.2d at 825-26; *Wood*, 865 F.2d at 414-16; *Cellucci*, 706 A.2d at 809-10; *Cooper*, 702 So.2d at 435-37. These courts have all gone on to hold that no-airbag claims *do* conflict with federal law, primarily because they supposedly interfere with the "options" created by Standard 208.

This ongoing dispute about the Safety Act's preemptive effect has serious practical consequences. There are currently thousands of automobile design defect lawsuits pending throughout the nation, hundreds of which involve the manufacturers' failure to install lap belts, shoulder harnesses, and/or airbags. The preemption issue has been raised or is lurking in all of these cases. The legal and judicial resources being spent on this issue are mushrooming, with no end to the conflict in sight.

It is clear, moreover, that the time is ripe for this Court to resolve the conflict for once and for all. Eleven years ago, in response to a petition for *certiorari* in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988) (finding no-airbag claims preempted by federal law), this Court invited the United States to express its views as to whether review was warranted. In response, the United States opined that review was premature given the lack of a conflict among the federal courts of appeals or state courts of last resort. *See Wood v. General Motors Corp.*, No. 89-46 (October Term, 1989), Brief for the United States as *Amicus Curiae*, at 16-17. The petition was ultimately denied. *See* 494 U.S. 1065 (1990).

In the wake of *Wood*, this Court declined to revisit the issue of preemption under the Safety Act until it granted review of the Eleventh Circuit's decision in *Myrick v. Freuhauf*, 13 F.3d 1516 (11th Cir. 1994). At first glance, *Myrick* appeared to present an opportunity for this Court to decide the same question presented here: *i.e.*, whether no-airbag claims are

preempted by federal law.[7] As it turned out, however, *Myrick* involved an entirely different aspect of vehicle performance – anti-lock brakes in trucks – as to which there was no federal regulatory standard in place. *See* 514 U.S. 280, 286 (1995); App. 6. This Court ultimately issued an extremely narrow ruling finding no express or implied preemption because of the absence of any applicable federal regulation. *See id.* at 286-90. Thus, *Myrick* did not decide what the preemptive effect of the Safety Act would be in cases where – as here – the federal government *has* regulated in the area.

In the years since *Myrick*, the issue of airbag preemption has grown increasingly ripe for review. One year after *Myrick*, the New Hampshire Supreme Court held that no-airbag claims are not preempted by federal law. *See Tebbetts*, 665 A.2d 345. The following year, the Tenth Circuit held precisely the opposite. *See Montag*, 75 F.3d 1414. Although both *Tebbetts* and *Montag* raised the no-airbag preemption issue, review was arguably premature since they were the first rulings issued by a state court of last resort and a U.S. Court of Appeals since this Court decided *Myrick*. This Court ultimately agreed, and the decisions in *Tebbetts* and *Montag* were permitted to stand.

Since that time, however, a post-*Myrick* split has developed and grown increasingly deep, with two more federal

[7] The Question Presented in the *Myrick* petition was as follows: "Whether the National Traffic and Motor Vehicle Safety Act preempts state common law standards that conflict with federal standards adopted pursuant to the Act for reasons of safety and practicability; or whether, as the Eleventh Circuit held, one sentence in *Cipollone v. Liggett Group, Inc.*, [504 U.S. 406 (1992)], forecloses such preemption." *Freightliner v. Myrick*, No. 94-286 (October Term, 1994), Petition for a Writ of Certiorari at (i). Although this question is worded in generic fashion, the petition itself relied on the split of authority relating to preemption of *no-airbag* claims as a basis for seeking Supreme Court review. *See id.* at 13-18.

courts of appeals and two more state supreme courts finding implied preemption of no-airbag claims, and four more state courts of last resort rejecting such a finding. Thus, the basis for denying review in *Tebbetts* and *Montag* no longer exists; the issue that was presented, but ultimately left unanswered, by *Myrick* is ready for resolution by this Court.

2. The Conflict Below Stems Primarily from Confusion About the Proper Approach to Preemption Analysis that Only this Court Can Resolve.

The lower courts' ongoing disagreement about the Safety Act's preemptive effect largely stems from confusion created by this Court's decision in *Myrick* over an important question of federal law: whether common law claims may *ever* be impliedly preempted under the Safety Act or any other federal statutes that contain express anti-preemption provisions explicitly preserving the precise aspect of state law at issue. To appreciate why *Myrick* caused such confusion, it is essential to understand the context in which that decision took place.

For 20 years after the Safety Act's 1966 enactment, the nation's appellate courts unanimously agreed that the Safety Act does not preempt common law claims.[8] In 1986, however,

[8] *See Larsen v. General Motors Corporation*, 391 F.2d 495, 506 (8th Cir. 1968); *Knippen v. Ford Motor Co.*, 546 F.2d 993, 1000 (D.C. Cir. 1976); *Fox v. Ford Motor Co.*, 575 F.2d 774, 778 (10th Cir. 1978); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Dorsey v. Honda Motor Co. Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *Volkswagen of America, Inc. v. Young*, 321

the U.S. Court of Appeals for the Third Circuit issued its since-rejected decision in *Cipollone v. Liggett Group, Inc.*, 789 F.2d at 181, expanding the implied preemption doctrine to find certain common law claims involving cigarettes preempted despite Congress' express intent to the contrary. Within a year, the First and Eleventh Circuits issued similar decisions. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987).

Before this Court had an opportunity to overturn these decisions, the defective strain of implied preemption analysis adopted in the cigarette cases infected the interpretation of the Safety Act. In 1988, the First Circuit heard *Wood,* 865 F.2d 395, in which General Motors was arguing, as it had repeatedly argued in the past, that it was exempt from common law liability because it had complied with a Federal motor vehicle safety standard – specifically, Standard 208 governing occupant restraints. In a two-to-one decision, the First Circuit explicitly adopted the rationale of *Palmer,* its then-recent cigarette labeling decision, and became the first appeals court in the nation to find a common law claim impliedly (but not expressly) preempted by the Safety Act, despite Congress' clear statement of anti-preemptive intent. *Wood,* 865 F.2d at 410-11. In the next three years, the Third, Tenth, and Eleventh Circuits (and several lower courts) followed, albeit on varying rationales. *See Pokorny*, 902 F.2d at 1116; *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Taylor*, 875 F.2d at 816.

In 1992, however, this Court issued its decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, explicitly

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A.2d 737, 746 (Md. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 345 N.E.2d 683, 688 (Mass. 1976); *Arbet v. Gussarson*, 225 N.W.2d 431, 438 (Wis. 1976).

rejecting the Third Circuit's (and its sister courts') expansion of the implied preemption doctrine. In a portion of the opinion joined by seven members of this Court, *Cipollone* held:

> In our opinion, the pre-emptive scope of the [two statutes at issue] is governed entirely by the express language in . . . each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' . . . 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation.

Id. at 517 (citations omitted). Thus, *Cipollone* held that the lower courts had erred in finding *implied* preemption of common law claims involving cigarettes, and that only *express* preemption analysis should have been employed. *Id.*[9]

Cipollone effectively overruled the various federal court of appeals decisions finding implied preemption of no-airbag claims under the Safety Act. It should have returned the lower courts to their unanimous view that the Safety Act expressly preserves all common law claims. And it probably would have done so, if not for the confusion caused by *Myrick*.

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[9] *See also id.* at 532 ("We resort to principles of implied pre-emption . . . only when Congress has been silent with respect to pre-emption.") (Blackmun J., concurring in part and dissenting in part); *id.* at 547 ("Once there is an express pre-emption provision, in other words, all doctrines of implied pre-emption are eliminated.") (Scalia, J., dissenting in part and concurring in the judgment).

In *Myrick*, this Court reviewed the first decision by a federal appeals court or state court of last resort to interpret the Safety Act's preemptive effect in the wake of *Cipollone*. *See Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994). As noted above, however, *Myrick* did not involve a no-airbag claim; rather, the case was a common law tort action for failure to install anti-lock brakes in a truck. *Id.* at 1518. And, unlike the no-airbag cases, which revolve around an alleged conflict between common law claims and Standard 208, there was no federal regulatory standard in effect governing anti-lock brakes in trucks. *See* App. 6. The Eleventh Circuit's decision, however, did not address this factual difference; instead, the court analyzed the case as though it involved a no-airbag claim. *See* 13 F.3d at 1519-22. It then reversed its prior holding in *Taylor*, 875 F.2d 816, that no-airbag claims are impliedly preempted under the Safety Act and Standard 208. In so doing, the Eleventh Circuit held that it was obligated to overturn *Taylor* in light of "*Cipollone*'s clear instruction that when there is an express pre-emption provision we should not consider implied pre-emption . . .." 13 F.3d at 1522.

This Court granted review to decide whether the Safety Act preempts common law claims that allegedly conflict with federal standards. *See supra* at n.7. However, this Court ultimately did not decide the issue because, as became apparent after review was granted, there was simply no federal safety standard in effect governing anti-lock brakes in trucks. Noting that the Safety Act's preemption clause "applies only '[w]henever a Federal motor vehicle safety standard is in effect,'" *Myrick* held that the absence of any federal standard foreclosed any finding of express preemption. 514 U.S. at 286-87. This Court accordingly declined to even consider whether the Act's savings clause expressly preserved all common law claims, *id.* at 287 n.3, or whether the Safety Act and Standard

208 would impliedly preempt a claim that an automobile is defective because it lacks an airbag. *Id.* at 289-90.

Myrick, however, went on to create massive confusion by rejecting as "without merit" the Eleventh's Circuit's holding that, under *Cipollone*, "implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute." *Id.* at 287. In an attempt to clarify the proper approach to preemption analysis, *Myrick* stated as follows:

> The fact that an express definition of the pre-emptive reach of a statute "implies" – i.e., supports a reasonable inference – that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption . . . At best, *Cipollone* supports an inference that an express preemption clause forecloses implied preemption; it does not establish a rule.

Id. at 288-89.

In regard to *Cipollone*, these statements made perfect sense. The two statutes at issue in *Cipollone* contained express preemption clauses (but, unlike, the Safety Act, no express savings clause). The fact that Congress thought to include those express clauses in the cigarette labeling statutes did not, without more, necessarily mean that Congress also thought of all other aspects of state law that might be preempted by the statutes – and intended to preserve them.

In the Safety Act, however, there is more than just an express preemption clause. There is an express *anti*-preemption clause explicitly preserving all common law claims. In *Myrick*, however, this Court did not address that fact, since it had

already deemed it unnecessary to decide the meaning of the savings clause given the absence of any federal regulatory standard governing anti-lock brakes. Instead, it simply said that the Eleventh Circuit's interpretation of *Cipollone* was "without merit" and then made the statements quoted above. As a result, *Myrick* has caused extensive confusion as to whether the Safety Act's express language precludes a finding of implied preemption in cases where – as here – there *is* a federal regulatory standard in place.

Thus, for example, five state courts of last resort have found that *Myrick* still "permits an inference" that, where Congress has clearly and unequivocally expressed an intention not to preempt common law claims, there can be no finding of implied preemption. *Munroe*, 938 P.2d at 1118. *See also Tebbetts*, 665 A.2d at 348; *Minton*, 684 N.E.2d at 658; *Drattel*, 699 N.E.2d at 382-83; *Wilson*, 660 N.E.2d at 334-36. In these courts' view, "*Myrick* did not overrule *Cipollone*. Rather, it is apparent that *Myrick* sought merely to disapprove of decisions interpreting *Cipollone* to mean that implied preemption can never exist when Congress has included an express preemption clause in the legislation in question." *Minton*, 684 N.E.2d at 658. *See also Wilson*, 660 N.E.2d at 336 (*Myrick* simply clarified that the mere existence of "an express preemption clause does not as a rule foreclose implied preemption.") These courts went on to hold, however, that the Safety Act's savings clause is so clear and unambiguous with respect to Congress' intent to preserve common law claims that any finding of implied preemption is foreclosed.[10]

[10] As noted above, however, in light of the unsettled state of the law in this area and the confusion created by *Myrick*, all but one of these courts went on to consider (and reject) the implied preemption claims.

In contrast, the two federal appellate courts and two of the state courts of last resort to consider the issue since *Myrick* have reached the opposite conclusion, holding that *Myrick* and *Cipollone*, taken together, "do[ ] not bar [a] court from considering [an automobile manufacturer's] implied preemption argument." App. 13. *See also Montag*, 75 F.3d at 1417; *Cellucci*, 706 A.2d at 809-10; *Cooper*, 702 So.2d at 435-37. These courts all went on to conclude that no-airbag claims are impliedly preempted by virtue of their conflict with federal law.

In short, in the time since *Myrick* "clarified" the appropriate approach to preemption analysis, no fewer than nine federal courts of appeals and state courts of last resort have come to radically different conclusions about whether it is even appropriate to consider – much less to find – implied conflict preemption of no-airbag claims. This confusion, moreover, has infected preemption analysis in Safety Act cases involving devices other than airbags,[11] and in cases involving other statutes with preemption provisions and savings clauses similar

[11] *Compare, e.g., Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir. 1998) (defective seatbelt claim impliedly preempted by Standard 208; rejecting argument that implied preemption analysis is barred under *Cipollone*), *cert. denied*, 119 S. Ct. 544 (1998), *with Garcia v. Volvo Europe Truck, N.V.*, 112 F.3d 291, 297 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 697 (1998); *Hyundai v. Alvarado*, 1998 WL 288678 (Tex. 1998) (no-lap-belt claim neither expressly nor impliedly preempted by Standard 208; noting that any finding of implied preemption is likely prohibited under *Cipollone*, but proceeding with implied preemption analysis as "jurisprudentially safer course"); *Hernandez-Gomez v. Volkswagen of America, Inc.*, 917 P.2d 236 (Ariz. 1996) (same); *Ketchum v. Hyundai Motor Co.*, 57 Cal. Rptr. 2d 595 (Cal. Ct. App. 1996) (no-lap-belt claim not expressly preempted by Standard 208; declining to reach implied preemption in light of Congress' clearly expressly intent to save common law claims); *Attocknie v. Carpenter Manufacturing, Inc.*, 901 P.2d 221 (Okla. App. 1995) (same).

to the Safety Act.[12] Thus, while *Myrick* may have provided some guidance regarding the proper approach to preemption analysis in cases like *Cipollone*, where the statute involved contains only a preemption clause (and no savings clause), it has created massive confusion among the lower courts about the preemptive effect of the Safety Act and other statutes with savings clauses that explicitly preserve all common law claims. Only this Court can resolve that confusion. To do so, it should grant review in this case and answer the important federal question presented.

3. Whether the Safety Act Preempts Common Law Claims is an Important Question of Federal Law Warranting Review.

The question of federal law presented by this case – whether the Safety Act preempts state common law claims that allegedly conflict with a federal safety standard – is extremely important. It boils down to this: whether courts are free to disregard the presumption against preemption, contravene

[12] For example, in *Lewis v. Brunswick*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 439 (1998), the Eleventh Circuit held that a common law claim alleging that a boat is defective because it lacks a propeller guard is impliedly preempted by federal law, even though the Federal Boat Safety Act expressly provides that "[c]ompliance with this chapter . . . does not relieve a person from liability at common law or under State law." *Id.* at 1503 (citing 46 U.S.C. § 4311(g)). *See also Carstensen v. Brunswick Corp.*, 49 F.3d 430, 432 (8th Cir.), *cert. denied*, 516 U.S. 866 (1995). These cases are in direct conflict with a pre-*Myrick* decision of the Texas Supreme Court holding that no-propeller-guard claims are not preempted by federal law. *See Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 513 U.S. 1057 (1994). Although this Court attempted to resolve this conflict by granting review in *Lewis*, the boat manufacturer settled the case after oral argument for an undisclosed sum of money. *See* "Unusual Settlement Removes Third Case from Justices' Reach," *The Washington Post*, May 26, 1998.

Congress' plainly-stated intent, and exempt manufacturers from liability under state common law by judicial decree. This is essentially the same issue that was presented – but ultimately left unanswered – in *Myrick*. *See supra* at 11-17 and n.7.[13] The time has come for this Court to resolve the controversy arising out of this critically important – but as yet unanswered – question.

Honda and its fellow manufacturers agree that the question presented is important. Four years ago, they jointly urged this Court to review the New Hampshire Supreme Court's decision in *Tebbetts*, 665 A.2d 345, which found no preemption of a common law claim that a car is defective because it lacks an airbag. *See Ford Motor Company v. Tebbetts*, No. 95-709 (October Term, 1995), Brief of the American Automobile Manufacturers Association and the Association of International Automobile Manufacturers, Inc. as *Amici Curiae* Supporting the Petition.[14] In their brief, the automobile manufacturers asserted that federal preemption of

[13] The decision below directly implicates the two questions of federal law that were explicitly reserved in *Myrick*: (1) Whether the term "standard" in the Safety Act's express preemption provision, 15 U.S.C. § 1392(d), preempts only state statutes and regulations, and not common law claims; and (2) whether 15 U.S.C. § 1397(k) is a savings clause that precludes a manufacturer from asserting its compliance with a federal safety standard to immunize itself from state common law liability. *See* 514 U.S. at 287. *See also* App. 6-7 (noting that "*Myrick* explicitly left open the question whether 'the term "standard" in 15 U.S.C. § 1392(d) preempts only state statutes and regulations, but not common law.' *Id.* at 287 n.3. Although it referred to § 1397(k), *see id.* at 284, the Court did not consider the relationship between the pre-emption and savings clauses.")

[14] At the time the brief was filed, respondent American Honda Motor Co. was a member of *amicus curiae* Association of International Automobile Manufacturers Association, which is a trade association representing the U.S. subsidiaries of international automobile companies.

no-airbag claims is "an issue of exceptional importance affecting national automobile safety and the automobile industry." *Id.* at 18. They emphasized that there are "literally millions of automobiles on the road today that are not equipped with airbags" (*id.* at 19) and that "[l]itigation over the preemptive effects of [Standard] 208 has proceeded for a decade, with no end in sight. . . . Only this Court can put an end to this controversy." *Id.* at 20.

The United States government also has taken the position that this is the type of no-airbag case that warrants review by this Court. As noted *supra* at 11, in response to the plaintiffs' petition for *certiorari* in *Wood*, 865 F.2d 395 (1st Cir. 1988), this Court invited the United States to express its views as to whether review was warranted. In its *amicus* brief, in addition to pointing out the absence of a fully-developed conflict on the issue (*id.* at 16-17), the United States stated that review was unwarranted because the vehicle at issue in *Wood* – a 1976 Blazer – was designed and manufactured before 1987, when the version of Standard 208 giving manufacturers a range of options with respect to the passive occupant restraint systems used in their vehicles went into effect. *Id.* at 18-19. Thus, *Wood* did not squarely present the issue of whether a common law no-airbag claim conflicts with the "options" framework established by Standard 208. Accordingly the government recommended that this Court wait to accept review of "a case involving a car as to which the [options] version of Standard 208 is applicable." *Id.* at 20. This is such a case, as the 1987 Honda Accord driven by Ms. Geier was manufactured after the relevant version of Standard 208 became law.

Nor could there be any serious question that this case implicates important issues of federal law. Since this Court decided *Myrick*, it has re-emphasized that two controlling principles guide preemption analysis. First, the inquiry starts

with a strong presumption *against* preemption, "particularly when Congress has legislated in a field which the States have traditionally occupied." *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996) (citation omitted). This approach "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Id.* Second, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* (citations omitted). "As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of *congressional purpose*." *Id.* (emphasis in original; citations omitted).

The decision below essentially disregards the presumption against preemption and Congress' plain language in the Safety Act. Congress could hardly have spoken more clearly with respect to its intent *not* to preempt common law claims: "Compliance with *any* Federal motor vehicle safety standard . . . shall not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added). As the United States explained in its *amicus* brief to this Court in *Myrick*:

> the text and structure of the Safety Act, taking the preemption provision, Section 1392(d), and the savings clause, Section 1397(k), in combination, demonstrate that the Safety Act does not expressly preempt judicial orders or duties of care imposed by the common law, but rather preserves manufacturers' tort liability under state law.

Freightliner Corp. v. Myrick, No. 94-286 (October Term, 1994), Brief for United States as *Amicus Curiae* Supporting Respondents, at 9. With reference to the savings clause, the government argued that the provision's "plain meaning" was

that "Congress intended that manufacturers could be held liable in tort, even if their vehicles complied with all relevant safety standards." *Id.* at 14.[15]

If the plain words of the Safety Act left any question as to Congress' intent in regard to common law claims, it would surely be answered by the statute's legislative history. The House Committee, which added section 1397(k) to the Safety Act, explained its purpose in clear and unequivocal terms:

> It is intended and this subsection specifically establishes, that *compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly* those relating to warranty, contract, and *tort liability*.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added). The legislative history, thus, conclusively demonstrates that the Safety Act means what it says: Congress expressly preserved all common law claims. Despite this seeming clarity,

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[15] The United States took a similar position in its *amicus* brief in *Lewis v. Brunswick Corp.*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 439 (1998), which presented the question of whether a claim that a boat was defective because it lacked a propeller guard is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. § 4306 (the "Boat Safety Act"), and by the U.S. Coast Guard's decision not to regulate propeller guards. *See Lewis v. Brunswick Corp.*, No. 97-288 (October Term, 1997), Brief for United States as *Amicus Curiae* Supporting Petitioners. There, the government argued that the Boat Safety Act, which contains a savings clause markedly similar to that at issue here, does not preempt *any* common law claims. In particular, the United States urged this Court to reject the manufacturer's express preemption arguments because, among other reasons, "the savings clause . . . makes clear Congress' explicit intent to preserve tort liability." *Id.* at 2. As noted *supra* at n.12, no decision was ever rendered in *Lewis* because the case was settled after oral argument.

a host of courts have nonetheless concluded that the Safety Act *expressly* preempts common law claims. *See* n.5, *supra*.

Given the foregoing, the decision below finding implied preemption of petitioners' no-airbag claims is plainly in error. In *Cipollone*, this Court found that Congress' enactment of extremely clear express preemption provisions, standing alone, bars resort to implied preemption principles. *See Cipollone*, 505 U.S. at 517. Here, Congress enacted both an express preemption provision and an express *anti*-preemption provision explicitly preserving the aspect of state law at issue. To allow implied preemption under these circumstances would render the limitations imposed on implied preemption in *Cipollone* meaningless – and make implied preemption analysis a tool for wholesale judicial activism and the widespread evasion of Congress' intent.

This issue, moreover, has implications beyond the cases arising under the Safety Act. Several other statutes contain savings clauses that are markedly similar to Section 1397(k). *See, e.g.*, Federal Boat Safety Act of 1971, 46 U.S.C. § 4311(g) ("[c]ompliance with this chapter does not relieve a person from liability at common law or under State law."); Consumer Product Safety Act, 15 U.S.C. § 2074(a) ("[c]ompliance with consumer product safety rules or other rules or orders under this Act shall not relieve any person from liability at common law or under State statutory law to any other person.") Nevertheless, various courts have held that common law claims can be expressly and/or impliedly preempted by these statutes. *See, e.g., Lewis*, 107 F.3d 1494 (11th Cir. 1997) (boat safety preemption); *Moe v. MTD*, 73 F.3d 179 (8th Cir. 1995) (consumer product preemption). This case therefore presents the opportunity to resolve the broader question presented in all of these cases: whether a plainly worded savings clause appearing expressly to preserve common law claims may be

disregarded to find preemption by virtue of a manufacturer's compliance with minimum federal safety standards.

Equally important, assuming that implied preemption can properly be considered, this case enables the Court to make clear that no-airbag claims are not impliedly preempted. Simply put, there is no conflict between petitioners' claims and Standard 208. It is true that Standard 208 required all 1987 model-year cars to have, at a minimum, either (1) a manual lap belt and shoulder harness, (2) an automatic belt system providing at least a specified level of protection in head-on crashes, or (3) an airbag or other device providing automatic protection in head-on and angular crashes. But is also true that Honda, which chose the first option, could have installed an airbag in the car driven by Ms. Geier *in addition to* the manual lap-belt and shoulder harness it installed, and still have complied with that option under Standard 208. And it is obvious that, if Honda had taken that step, Ms. Geier would have been safer. If, by failing to install an airbag, Honda violated the common law of the District of Columbia and caused Ms. Geier's injuries, Congress did not intend to exempt Honda from liability. Section 1397(k) makes that fact plain.

The lack of a conflict between petitioners' claims and federal law is made even clearer by the regulatory history of Standard 208, which is devoid of any suggestion that the federal government intended to preempt airbag-related common law claims. To the contrary, when it promulgated the version of Standard 208 applicable in this case, the federal government said that the design that petitioners assert Honda should have used in its car offered the most safety benefits of any occupant restraint system. *See* 49 Fed. Reg. at 28,986 (1984) ("[T]he most effective system is an airbag plus a lap and shoulder belt."). The regulatory preamble specifically noted that manufacturers would be prompted to use the best system by,

among other things, the threat of "potential liability for any defunct system." *Id.* at 29,000. And it tellingly quoted – without disagreement – the formal comment of a public health official that "[p]eople whose crash injury would have been averted had the car been equipped with an airbag can sue the car manufacturer to recover the dollar value of the injury." *Id.* at 28,972.

That is precisely what petitioners seek to do here. This Court has repeatedly refused to find that Congress intended to deprive tort victims of common law remedies, even when Congress has not expressly preserved common law claims, saying "it is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Medtronic*, 116 S. Ct. at 2251 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)). In this case, Congress *did* comment and it expressly *preserved* all common law claims. The Court should grant review to ensure that Congress' intent is respected and that the Geiers – and thousands of similarly situated Americans – are not illegally denied their day in court.

CONCLUSION

This petition for writ of *certiorari* should be granted.

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Date: May 5, 1999

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 22, 1998 Decided February 5, 1999

No. 98-7006

ALEXIS GEIER, ET AL.,
APPELLANTS

V.

AMERICAN HONDA MOTOR COMPANY, INC., ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 95cvOO064)

Arthur Bryant argued the cause for appellants. With him on the briefs were *Robert M.N. Palmer*, *William Petrus* and *James W. Taglieri*.

Benjamin S. Boyd argued the cause and filed the brief for appellees. *Philip L. Cohan* entered an appearance.

Before: WILLIAMS, GINSBURG and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: The question on appeal is whether federal law pre-empts a defective design lawsuit against the American Honda Motor Company for damages arising from injuries suffered by Alexis Geier[1] when her 1987 Honda Accord, which did not have an airbag, crashed into a tree. The district court granted summary judgment for Honda on the ground that the lawsuit was pre-empted by the National Traffic and Motor Vehicle Safety Act of 1966, as amended, 15 U.S.C. § 1381 *et seq.* (Safety Act), and the Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (1997) (Standard 208), which govern the passive safety restraints that automobile manufacturers must install.[2] Joining our sister circuits, we affirm, concluding that Geier's lawsuit is impliedly pre-empted.

Under the Supremacy Clause of the Constitution, the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. In applying this Clause, courts have identified three ways in

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[1] Appellants are Alexis Geier, a minor at the time of the accident, and her parents, William and Claire Geier. For ease of reference we refer to appellants as "Geier."

[2] The Safety Act is now codified at 49 U.S.C. § 30101 *et seq.* Geier's complaint was filed after the recodification. The revisions, however, were made "without substantive change" to the underlying provisions. *See* Pub. L. No. 103-272, § l(a), 108 Stat. 745, 745 (1994). Because the relevant circuit courts of appeal decisions, the district court, and the parties all use the old designations, we will use them as well.

which a federal statute or regulation can pre-empt state law: by express pre-emption, by "field" pre-emption (in which Congress regulates the field "so extensively that [it] clearly intends the subject area to be controlled only by federal law"), and by implied or conflict pre-emption, which applies when a state law conflicts with a federal statute or regulation. *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 767 (11th Cir. 1998); *see also Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). The Supreme Court has identified two presumptions that courts must consider when invoking the doctrine of pre-emption. First, in areas where States have exercised their historic police powers (such as the health and safety of their citizens), courts must start with a presumption against pre-emption, absent a "clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Second, in every pre-emption case, "[t]he purpose of Congress is the ultimate touchstone." *Id.* (quoting *Retail Clerks v. Schennerhorn*, 375 U.S. 96, 103 (1963)).

For cars manufactured between September 1, 1986, and September 1, 1987, the inclusion of a driver-side airbag was one of several passive restraint "options" from which car manufacturers could choose in order to comply with Standard 208.[3] *See* 49 C.F.R. § 571.208, S4.1.3.1.1 (1997). The effect of Standard 208 on state law is governed by two provisions of

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[3] The requirements of Standard 208 have become more stringent. After September 1, 1989, car manufacturers had to install "either an airbag or an automatic seatbelt that would signal the driver with a warning light if the belt became unhooked." *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1412 (9th Cir. 1997) (citing 49 C.F.R. § 571.208). Presently, passenger cars manufactured after September 1, 1997, must have "an inflatable restraint system at the driver's and right front passenger's position." 49 C.F.R. § 571.208, S4.1.5.3 (1997). *See generally Wood v. General Motors Corp.*, 865 F.2d 395, 398-99 (lst Cir. 1988).

the Safety Act. The first, 15 U.S.C. § 1392(d),[4] provides:

> [w]henever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

The second provision, 15 U.S.C. § 1397(k),[5] a so-called savings clause, provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Without stating whether it was adopting a theory of express or implied pre-emption, the district court reasoned that § 1392(d) pre-empted Geier's claim because recovery under her common law tort theory might establish a safety standard that was not identical to Standard 208. Adopting an

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[4] Section 1392(d) is now codified at 49 U.S.C. § 30103(b)(1) (1994), which uses similar language:

> [w]hen a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. . . .

[5] Section 1397(k) is now codified, with some changes, at 49 U.S.C. § 30103(e) (1994): "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."

approach articulated by the First Circuit in *Wood v. General Motors Corp.*, 865 F.2d 395, 408 (lst Cir. 1988), and developed by the Ninth Circuit in *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1415 (9th Cir. 1997), the district court ruled that although §§ 1397(k) and 1392(d) might appear to be in "direct conflict[,] . . . it is clear that both sections can be given effect if the court finds that 'compliance with Federal standards does not exempt anyone from any liability that the States have authority to impose.'" *Geier v. American Honda Motor Co.*, CA. No. 95-64, at 3 (D.D.C. Dec. 10, 1997) (quoting *Harris*, 110 F.3d at 1415). In the district court's view, a State lacks authority to require airbags because § 1392(d) and Standard 208 pre-empt such a requirement, and therefore no common law design defect claim remained for § 1397(k) to preserve.

On appeal, Geier contends that the district court erred in granting summary judgment because § 1392(d) expressly preserved all common law claims against pre-emption and the term "standards" in § 1392(d) applies only to state legislation or regulations. Honda maintains that summary judgment was appropriate because the Safety Act either expressly preempts Geier's lawsuit, or impliedly pre-empts it because a verdict in her favor would conflict with Standard 208.[6]

II.

The Supreme Court has considered pre-emption under § 1392(d), although it did not directly address the issues presented in the instant appeal. *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), involved Standard 121, which was promulgated by the National Highway Traffic Safety

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[6] Honda does not maintain that field pre-emption applies.

Administration acting pursuant to the Safety Act, and required that tractor trailers stop within a certain distance. For all practical purposes, Standard 121 required the installation of antilock braking systems ("ABS"). Following the decision of the Ninth Circuit that Standard 121 was unsupported by substantial evidence, *see id.* at 285 (citing *Paccar, Inc. v. NHTSA*, 573 F.2d 632 (9th Cir. 1978)), a driver seriously injured in a collision with an 18-wheel tractor-trailer sued a truck manufacturer under a common-law state tort theory, alleging that the absence of ABS on the truck was a design defect that caused it to jackknife when the truck driver attempted to make a sudden stop. *See id.* at 282-83. In response, the manufacturer asserted that § 1392(d) expressly pre-empted such claims. The Supreme Court rejected this argument, observing that in view of the Ninth Circuit's suspension of Standard 121,[7] "[t]here is no express federal standard addressing stopping distances or vehicle stability for trucks and trailers" and that "States remain free to 'establish, or to continue in effect,' their own safety standards concerning those 'aspect[s] of performance.'" *Id.* at 286 (quoting § 1392(d)) (alteration in original). The Court further concluded that the claims were not impliedly pre-empted because the absence of any federal regulation governing ABS meant that private parties would not face a conflict between complying "with both federal and state law." *Id.* at 289. The Court also concluded that a finding of liability against tractor-trailer manufacturers "would undermine no federal objectives or purposes with respect to ABS devices." *Id.* at 289-90. The Court explicitly left open the question whether "the term

[7] The Ninth Circuit, in rejecting Standard 121, recognized that further refinement of the ABS system might lead to greater public safety. It thus held that the agency could enforce an ABS requirement if it could produce "more probative and convincing data evidencing the reliability and safety" of vehicles with ABS. *Paccar*, 573 F.2d at 643.

'standard' in 15 U.S.C. § 1392(d) preempts only state statutes and regulations, but not common law." *Id.* at 287 n.3. Although it referred to § 1397(k), *see id.* at 284, the Court did not consider the relationship between the pre-emption and savings clauses.

Thus far, five circuit courts of appeal have analyzed the issue of pre-emption under the Safety Act when plaintiffs have brought design defect claims based on the absence of airbags. In each case, Section 208 did not require airbags for the model-year cars in question, but presented them as one of several options from which manufacturers could choose. Four of the five circuit courts of appeal held that such claims were impliedly pre-empted, while the Ninth Circuit held that the claims were expressly pre-empted. *See, e.g., Harris*, 110 F.3d at 1416 (9th Cir.); *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1417 (10th Cir. 1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1126 (3d Cir. 1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 827 (11th Cir. 1989);[8] *Wood*, 865 F.2d at 412 (lst Cir.). Contemporaneously, however, a number of state supreme courts have reached the opposite conclusion, holding that the Safety Act does not preclude these types of claims, relying heavily on the broad sweep of the savings clause. *See, e.g., Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376, 382, 383-86 (N.Y. 1998); *Munroe v. Galati*, 938 P.2d 1114, 1119-20 (Ariz. 1997); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345, 347-48 (N.H. 1995).

[8] The Eleventh Circuit recently reaffirmed *Taylor*. In *Irving*, the court noted that although its decision in *Myrick v. Fruehauf Corp.* stated that *Taylor* had been abrogated in part, *see* 136 F.3d at 767 n.1 (citing *Myrick*, 13 F.3d 1516, 1521-22 (11th Cir. 1994)), subsequent Supreme Court precedent made clear that "*Taylor* is correct and can be used for evaluating pre-emption of state law." *Id.*

As noted, Geier contends that § 1392(k) expressly preserved "all common law claims" against pre-emption and that the term "standards" in § 1392(d) applies only to state legislation or regulations. This contention obviously cannot be rejected out of hand, yet nor can Honda's contention that "§ 1392(d) expressly preempts state safety standards not 'identical' to applicable federal standards." In Honda's view, because Standard 208 allowed car manufacturers the option of choosing an airbag, a jury verdict in favor of Geier on her design defect claim would require car manufactures to comply with a different standard.[9]

The language of § 1392(d) is fairly sweeping, providing that when a federal motor vehicle safety standard is in effect, "no State or political subdivision of a State shall have *any* authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment *any* safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d) (emphasis added). At a minimum, this language restricts a State's authority to enact legislation or regulations that affirmatively require car manufacturers to adopt standards not identical to Standard 208. *See Wood,* 865 F.2d at 408. In other words, a State could not require, by statute or regulation, that a car manufacturer install airbags in models for which Standard 208 makes them only an option.

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[9] However, Geier's contention that the term "safety standard" in § 1392(d) applies to aspects of performance, while her lawsuit involves a design defect, gets her nowhere for reasons noted by the First Circuit in *Wood*, 865 F.2d at 416-17, including that although design and performance standards are "analytically distinct, in practice the line is not so clear," as here where "[b]y requiring seat belts or passive restraints, [Standard] 208 has elements of a design standard."

On its face, moreover, the term "standard" in § 1392(d) could apply to the requirements imposed by common law tort verdicts. As the Supreme Court has observed, state "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone,* 505 U.S. at 521 (plurality opinion) (quoting *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959)); *see also Harris,* 110 F.3d at 1414; *Wood*, 865 F.2d at 410. So understood, the term "standard" in § 1392(d) is broad enough to include duties established by state tort law. *See Wood,* 865 F.2d at 410. As the Supreme Court's decision in *Medtronic,* 518 U.S. 470, analyzing the Medical Device Amendments of 1976 suggests, the use of the term "standard" in the Safety Act and "requirements" in the Medical Device Amendments appear to be for the same purpose, namely, to establish that a State cannot impose a duty on manufacturers that differs from those imposed by the federal government.[10] Common law liability in this specific context, therefore, can reasonably be viewed as constituting a "standard" that might conflict with Standard 208.

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[10] In *Medtronic*, five justices agreed that "state common-law damages actions do impose 'requirements' and are therefore pre-empted where such requirements would differ from those imposed" by the statute. 518 U.S. at 509 (O'Connor, J., concurring in part and dissenting in part); *id.* at 504 (Breyer, J., concurring in judgment). The *Medtronic* plurality, in contrast, concluded the term "requirements" was "linked with language suggesting that its focus is device-specific enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries," *id.* at 489, although it recognized that the Court "on prior occasions concluded that a statute pre-empting certain state 'requirements' could also pre-empt common-law damages claims." *Id.* at 487-88.

Section 1392(d), however, cannot be viewed in isolation, *see American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 (1981), but must be interpreted in light of the savings clause in § 1397(k), which provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Honda interprets this language as preventing car manufacturers from using compliance with federal safety standards as a defense to common law liability, in cases where the State retains authority to impose such liability, and there is legislative history to support this view.[11] For example, Honda maintains that even with § 1392(d), plaintiffs could still pursue design defect claims when federal standards do not address the component at issue. The Ninth Circuit in *Harris* reached a similar conclusion, noting that "§ 1392(d) removes the States' authority to subject anyone to liability for the breach of non-identical safety standards. The most reasonable and plausible reading of § 1397(k), therefore, is that compliance with Federal standards does not exempt anyone from any liability that the States *have authority to impose.*" 110 F.3d at 1415 (emphasis added). *Cf. Wood*, 865 F.2d at 412.

The conclusion that Geier's lawsuit is expressly pre-empted by the Safety Act is problematic, however, for two reasons. First, the interpretation of the two provisions

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[11] H.R. Rep. No. 1776, at 24 (1966) ("It is intended, and this subsection [§ 1397(k)] specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law. . . ."); S. Rep. No. 1301, at 12 (1966) (noting that "the Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law").

adopted by *Harris* is not the only one available. For example, the broad language of the savings clause raises doubts that Congress intended to preserve State authority to impose standards only to the extent that the pre-emption clause did not take that power away. As the Court of Appeals of New York observed, "[i]t strains reason and common sense to suggest that Congress used sweeping language to create a constricted universe." *Drattel*, 699 N.E.2d at 382. The inclusion of a broadly worded savings clause such as § 1397(k) indicates that Congress did not wish to deprive plaintiffs of all their remedies at common law. To read § 1397(k) too narrowly would undermine the section's express language preserving common law liability. *Pokorny*, 902 F.2d at 1121.

Second, the presumption against pre-emption counsels against finding express pre-emption when the purpose of Congress is not clear from the statute's language. In light of the apparent tension between §§ 1392(d) and 1397(k), it would be difficult to discern from the Act a "clear and manifest purpose of Congress" to pre-empt a design defect claim based on the absence of an airbag. *See Medtronic*, 518 U.S. at 485. Four other circuits agree. *See Pokorny*, 902 F.2d at 1121 (3d Cir.); *Taylor*, 875 F.2d at 823-25 (11th Cir.); *Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989); *Wood*, 865 F.2d at 401 (1st Cir.).[12]

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[12] Although these circuits reject express pre-emption of no-airbag claims, their analysis differs. The First Circuit, for example, suggested that Congress in 1966 did not contemplate the development within state tort law of design defect claims that might conflict with federal safety standards. *Wood*, 865 F.2d at 403-04. As a result, the *Wood* court found no congressional intent either to pre-empt this type of action under section 1392(d) or to preserve it under the savings clause. *Id.* at 407. *Cf. Kitts*, 875 F.2d at 789 (adopting *Wood*'s implied pre-emption analysis without

(continued...)

Ultimately, we need not resolve whether Geier's claim is expressly pre-empted, however, because we conclude that a verdict in her favor would stand as an obstacle to the federal government's chosen method of achieving the Act's safety objectives, and consequently, the Act impliedly pre-empts her lawsuit. The conclusion arises largely from the position advanced by Honda, in the alternative, that state jury verdicts that hold manufacturers liable for not installing airbags will create a conflict with Standard 208.

As a threshold matter, we are unpersuaded by Geier's contention, relying on *Cipollone*, that the court cannot reach the implied pre-emption argument because congressional intent is expressly stated in § 1397(k), which saves all common law claims from pre-emption, and therefore only express pre-emption analysis is applicable. It is true that the Supreme Court in *Cipollone* observed that when Congress has included a provision explicitly addressing the issue of pre-emption, and

> when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from substantive provisions of the legislation. . . . Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

505 U.S. at 517 (citations and internal quotation marks omitted). But the Supreme Court has also rejected Geier's interpretation. In *Myrick*, the Court noted that some circuit courts of appeal had read *Cipollone* to mean that "implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute. This argument is without merit." *Myrick*, 514 U.S. at 287. The Court instructed that the presence of "an express definition of the pre-emptive reach of a statute" only creates a reasonable inference "that Congress did not intend to pre-empt other matters." *Id.* at 288. Such a clause does not "entirely foreclose[ ] any possibility of implied pre-emption." *Id.*

The tension between §§ 1392(d) and 1397(k) prevents the identification of any "express definition" of the reach of pre-emption in the Safety Act. Furthermore, in *Myrick* the Supreme Court engaged in implied pre-emption analysis of the Safety Act after concluding that § 1392(d) did not "expressly extinguish state tort law" for no-ABS claims. *Id.* at 287; *see also Montag*, 75 F.3d at 1417. Rejecting the argument that *Cipollone* barred consideration of implied pre-emption in all cases involving express pre-emption language, the Supreme Court concluded that no implied pre-emption existed on the facts before it because "there is simply no federal standard for a private party to comply with." *Myrick*, 514 U.S. at 289. Therefore, *Cipollone* does not bar this court from considering Honda's implied pre-emption argument.

Implied conflict pre-emption occurs "where it is impossible for a private party to comply with both state and federal requirements, . . . or where state law stands as an obstacle to the accomplishment and execution of the full

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[12] (...continued)
discussing in detail the express pre-emption issue). The Third and Eleventh Circuits have criticized the *Wood* court's express pre-emption analysis, concluding that the savings clause covers design defect claims. *Pokorny*, 902 F.2d at 1121 n.6; Taylor, 875 F.2d at 825. The Eleventh Circuit agreed with the First Circuit, however, that express pre-emption did not apply in view of the conflict between the pre-emption and savings clauses and "the failure of Congress explicitly to include reference to state common law in the Act's pre-emption clause." *Id.* The Third Circuit also noted that Congress in other statutes had explicitly referred to common law actions when it sought to pre-empt them. 902 F.2d at 1121.

purposes and objectives of Congress." *Id.* at 287 (internal quotation marks omitted). Federal regulations, as well as federal statutes, can pre-empt conflicting state law. *Pokorny*, 902 F.2d at 1122; *see also Fidelity Fed. Sav. & Loan Assn v. de la Cuesta*, 458 U.S. 141, 153 (1982). Unlike *Myrick*, in which the Supreme Court found no implied pre-emption, *see* 514 U.S. at 288, the instant case involves a federal safety standard that governs the use of airbags in 1987 model-year cars. Although the standard does not mandate or forbid the use of airbags, it presents them as one of several options from which manufacturers may choose. While Geier maintains not unpersuasively that a design defect lawsuit based on the absence of an airbag does not conflict with Standard 208 because Honda can be held accountable under state law for failing to do more than the minimum required by the option it chose (*i.e.* installing a manual seat belt with a warning light), her argument fails to surmount the obstacle that a favorable verdict would present to achieving congressional objectives in the chosen manner. As the First Circuit observed in *Wood*, allowing liability for the absence of airbags would "interfere[ ] with the *method* by which Congress intended to meet" its goal of increasing automobile safety. *Wood*, 865 F.2d at 408. A successful no-airbag claim would mean that an automobile without an airbag was defectively designed. Congress, however, delegated authority to prescribe specific motor vehicle safety standards to the Secretary of Transportation, *see* 49 U.S.C. § 30111(a) (1994), who in turn explicitly rejected requiring airbags in all cars on the ground that a more flexible approach would better serve public safety. 49 Fed. Reg. 28,962, 29,000-02 (1984).

The tortured history of Section 208 demonstrates that federal regulators have vacillated on the relative merits of requiring or including airbags in passenger vehicles. *See Wood*, 865 F.2d at 398-99. It also reveals how far public

acceptance of air bags has come and, concomitantly, the success of the Secretary's decision on how to implement the Act. When the Secretary promulgated the regulations at issue in this case, she rejected an all-airbag rule out of concern that notwithstanding the safety benefits of airbags, the public might respond negatively to the unfamiliar technology if it was required in all cars. 49 Fed. Reg. at 28,989. In the Secretary's view, gradually phasing in airbags could potentially address "unfounded" fears among members of the public that airbags were unsafe because affording consumers a choice among passive restraint systems would expose them to the benefits of the airbag technology. *Id.* at 28,988, 29,001. *Cf. State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 488-89 (D.C. Cir. 1986). At the same time, the Secretary was concerned that not affording manufacturers discretion to install an automatic occupant restraint system ran the risk of impeding the development of more effective protective systems. 49 Fed. Reg. at 29,001. Thus, a performance standard making airbags one of several options car manufacturers could choose to comply with the passive restraint requirements of Standard 208, rather than mandating specific use of one safety device, would advance public safety in two respects, by allowing consumers to adjust to the new technology and by permitting experimentation with designs for even safer systems. 49 Fed. Reg. at 28,988, 28,997.

With this history in mind, and consistent with the policy decision made by the Secretary, we conclude that allowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department's policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems. Even if the Secretary's gradual adoption of an airbag requirement has increased public acceptance of the technology over time, concerns about public reaction still

existed when Geier's 1987 Honda was manufactured. Furthermore, regardless of possible fluctuations in public acceptance of airbags at that time, the concern about fostering the most effective passive restraint systems through experimentation remained. Therefore, "[b]ecause potential common law liability interferes with the regulatory methods chosen by the federal government to achieve the Safety Act's stated goals," *Pokorny,* 902 F.2d at 1123, Geier's lawsuit claiming that the car she was driving was defectively designed because it lacked airbags is implicitly pre-empted.[13] Accordingly, we affirm the grant of summary judgment to Honda.

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[13] Contrary to Geier's contention, our conclusion is not at odds with the position taken by the United States in prior Safety Act cases. The United States has previously contended that § 1392(d) "does not expressly or impliedly preempt design defect tort actions based on the claim that a vehicle was defective simply because it did not contain an airbag." Brief of the United States as Amicus Curiae, on Petition for a Writ of Certiorari at 7, *Wood v. General Motors Corp.*, 494 U.S. 1065 (1990) (No. 89-46). But, the United States ultimately concluded that a no-airbag claim was pre-empted in *Wood* because the Department of Transportation specifically determined that "an all airbag rule would *disserve* the *safety* purposes of the Act" and that this policy "would be disrupted by tort liability, which therefore would be pre-empted." *Id.* at 15 (emphasis in original). "If manufacturers are held liable for not installing airbags, . . . [a sizeable damage award against them] is likely to lead auto makers to install airbags in all cars. That outcome would obviously eliminate the diversity that the Secretary [of Transportation] found necessary to promote motor vehicle safety." *Id.* at 13-14; *see also* Brief of the United States as Amicus Curiae, on Petition for a Writ of Certiorari at 28, *Freightliner Corp. v. Myrick,* 514 U.S. 280 (1995) (No. 94-286).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALEXIS GEIER, et al.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 95-0064 (WBB)
AMERICAN HONDA MOTOR CO., INC., et al.,	)	**FILED** **DEC 10, 1997** **Clerk, U.S. District Court** **District of Columbia**
Defendants.	)	

MEMORANDUM

Plaintiffs filed this action for negligence against Defendants for injuries arising out of an accident that occurred while Alexis Geier was driving a 1987 Honda Accord. Plaintiffs' claim is based on the fact that the 1987 Honda Accord was not equipt with an airbag. Defendants have filed a motion for summary judgment, arguing that such claims are pre-empted by the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.* (now 49 U.S.C. § 30101 *et seq.*) and the Federal Motor Vehicle Safety Standard 208, 49 C.F.R. §571.208. This motion is currently before the Court.

Neither the issues raised by Plaintiffs nor the arguments presented by Defendants are novel. While these issues and

arguments have caused a split among the many state courts and federal district courts that have looked at this question, the federal circuit courts have unanimously concluded that a cause of action for negligence based on the failure of a car manufacturer to install airbag during the 1980s is pre-empted by federal law. *Harris v. Ford Motor Company*, 110 F.3d 1410, 1416 (9th Cir. 1997); *Montag v. Honda Motor Co. Ltd.*, 75 F.3d 1414, 1417 (10th Cir. 1996); *Pokorney v. Ford Motor Co.*, 902 F.2d 1116, 1118 (3rd Cir. 1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 828 (11th Cir. 1989); *Wood v. General Motors Corp.*, 865 F.2d 395, 419 (1st Cir. 1988). Two other judges within this district have also found common law causes of action pre-empted by the national Traffic and Motor Vehicle Safety Act and the Federal Motor Vehicle Safety Standard 208. *Wiley v. General Motors Corp.*, No. 96-1692, order granting summary judgment, (D.D.C. 1996); *Hoftel v. General Motors Corp.*, 1988 WL 19615, *3 (D.D.C. 1988).

The Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2, ensures that state law which conflicts with federal law is not given effect. The court should look to congressional intent when determining whether state law is pre-empted by federal law. *Medtronic v. Lohr*, 116 S. Ct. 2240, 2250. The clearest expression of congressional intent is found in the language of the law itself as well as the "statutory framework" surrounding it. *Id.*

When examining the language of the National Traffic and Motor Vehicle Safety Act we see that § 1392(d) prohibits states from establishing "any safety standard" not identical to the Federal Motor Vehicle Safety Standard 208 in effect at the time the vehicle is manufactured, which, in 1987, gave car manufacturers a choice as to whether to install airbags or not. Recovery on tort claims, such as that asserted by Plaintiffs, is

equivalent to a safety standard promulgated by the state legislature or a state regulatory body. "State regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521. Because the Federal Motor Vehicle Safety Standard 208 demonstrates that "the Federal Government has weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via a specific mandate on manufacturers or producers," *Harris*, at 1414 (quoting *Medtronic v. Lohr*, 116 S. Ct. 2240 at 2258), Plaintiffs' claim seems to be pre-empted by § 1392(d). However, the court must also determine the import and effect of § 1397(k) of the National Traffic and Motor Vehicle Safety Act which provides that "compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from liability under common law." At first, § 1397(k), the savings clause, and § 1392(d), the pre-emption clause, seem to be in direct conflict. However, reading these sections together in light of the Supreme Court's pronouncements on the effect of common law regulation, it is clear that both sections can be given effect if the court finds that "compliance with Federal standards does not exempt anyone from any liability that the States have authority to impose." *Harris* at 1415. The clearest example of this is common law liability connected with design defects. This persuasive reading of the language of the law demonstrates conclusively that Plaintiffs' claim is pre-empted by federal law.

The "statutory framework" as revealed in Congress'

entire regulatory scheme further supports the conclusion that Congress intended the National Traffic and Motor Vehicle Safety Act to preempt findings of common law negligence when manufacturers failed to install airbags in cars manufactured in 1987. Throughout the 1980s the Department of Transportation refused to require airbags based on a reasoned consideration of the long-term safety effects of such a mandate, hoping that even more effective and efficient occupant protection systems would be developed.

For these reasons Defendants' motion for summary judgment will be granted in an order accompanying this Memorandum.

/S/
William B. Bryant
Senior United States District Judge

Date: December 9, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALEXIS GEIER, et al., Plaintiffs,	)	
v.	)	C.A. No. 95-0064 (WBB)
AMERICAN HONDA MOTOR CO., INC., et al., Defendants.	)	**FILED DEC 10, 1997 Clerk, U.S. District Court District of Columbia**

ORDER

For the reasons set forth in the foregoing Memorandum, it is this 9th day of December, 1997 hereby

ORDERED that Defendants' motion for summary judgment be, and the same is hereby, GRANTED.

/S/
William B. Bryant
Senior United States District Judge

Supreme Court, U.S.
FILED
JUL 9 1999
OFFICE OF THE CLERK

(2)

No. 98-1811

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

ALEXIS GEIER, et al.,

Petitioners,

v.

AMERICAN HONDA MOTOR CO., INC., et al.,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should review a decision of the United States Court of Appeals for the District of Columbia Circuit which concluded that petitioners' tort claim, that respondents' 1987-model automobile was defectively designed because it was not equipped with an airbag, was impliedly preempted by the National Traffic and Motor Vehicle Safety Act of 1966.

RULE 29.6 STATEMENT

American Honda Motor Co., Inc.

Calhac, Inc.
American Honda Finance Corp.
- American Honda Insurance Services, Inc.
- American Honda Receivables Corp.
- American Honda Service Contract Corporation
- Honda Canada Finance, Inc.

Honda of America Mfg., Inc.
- Benton Water Supply, Inc.
- Honda of America Foundation
- Honda De Mexico S.A. De C.V.

Honda Power Equipment Mfg., Inc.
Honda Performance Development, Inc.
Honda Transmission Mfg. of America, Inc.
Honda South Carolina Mfg., Inc.

Honda Motor Co., Ltd.

Japan
- Honda R&D Co., Ltd.
- Honda Engineering Co., Ltd.
- Hadsky, Inc.
- Yutaka Giken Co., Ltd.
- Honda Foundry Co., Ltd.
- Asamagiken Co., Ltd.
- Honda Lock Mfg., Co., Ltd.
- Honda Access Sales Corp.
- Honda Motor Parts Service Co., Ltd.
- Honda Access Corp.
- Honda Parts Sales Co., Ltd.
- Honda Finance Co., Ltd.
- Suzuka Circuitland Co., Ltd.
- Honda Trading Corporation
- Honda Leasing Corporation

- Honda Sogo Tatempno Corp., Ltd.
- Honda Verno Shin Tokyo Co., Ltd.
- Twin Ring Motegi Co., Ltd.

North America
- American Honda Motor Co., Inc.
- Honda North America, Inc.
- Honda of America Mfg., Inc.
- American Honda Finance Corp.
- Honda R&D North America, Inc.
- Honda Canada Inc.

Europe
- Honda Austria G.m.b.H.
- Honda Europe N.V.
- Honda Belgium N.V.
- Honda Motor Europe Limited
- Honda France S.A.
- Honda Deutschland G.m.b.H.
- Honda Nederland B.V.
- Honda International Finance B.V.
- Honda Italia Industriale-S.p.A.
- Honda Automobili Italia S.p.A.
- Honda Automovel de Portugal S.A.
- Honda Motor de Portugal, S.A.
- Honda Automoviles Espana, S.A.
- Montesa Honda S.A.
- Honda (Suisse) S.A.
- Svenko Honda Bil Import A.B.

Rest of the World
- P.T. Honda Prospect Engine Manufacturing
- P.T. Honda Federal Inc.
- Asian Honda Motor Co., Ltd.
- Thai Honda Manufacturing Co., Ltd.

Honda Motor do Brasil Ltda.
Honda de Mexico, S.A. de C.V.
Honda Australia Pty., Ltd.
Honda New Zealand Limited
Honda-Mindong Generator Co., Ltd.
Honda S. (a) Cars India Ltd.
Kinetic Honda Motor Ltd.
P.T. Honda Prospect Engine Manufacturing
Honda Auto Parts Mfg. (M) Sdn. Bhd.
Honda Atlas Cars (Pakistan) Ltd.
Honda Philippines Inc.
Honda Engine Mfg. Philippines Inc.
Honda Parts Manufacturing Corp.
Honda Cars Manufacturing (Thailand) Co., Ltd.
Thai Honda Manufacturing Co., Ltd.
Honda Vietnam Co., Ltd.
Honda Gulf Pze.
Honda Anadolu Motorslklet Uretim Ve Pazarlama A.S.
Honda Motor De Argentina S.A.
Honda Del Peru S.A.

Honda of American Mfg., Inc.

Benton Water Supply, Inc.
Honda of America Foundation
Honda De Mexico S.A. De C.V.

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In The
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v.

AMERICAN HONDA MOTOR CO., INC., et al.,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' BRIEF IN OPPOSITION

Joining five other circuit courts, the District of Columbia Circuit Court of Appeals concluded that petitioners' no-airbag tort claim was impliedly preempted by federal law because such tort claims conflict with the method chosen by the federal government to achieve the goals of the National Traffic and Motor Vehicle Safety Act of 1966 ("the

Safety Act"). In particular, the Court of Appeals carefully reviewed the federal regulatory scheme, and recognized that common law no-airbag tort claims would frustrate the federal government's policy of encouraging (1) public acceptance of airbags, and (2) "experimentation with better passive restraint systems." App. 15. The Court of Appeals correctly concluded that a no-airbag claim is preempted because the Department of Transportation specifically determined that "an all airbag rule would disserve the safety purposes of the Act," and that this policy "would be disrupted by tort liability." App. 16. Moreover, the Court of Appeals correctly followed and applied controlling Supreme Court precedents governing federal preemption of state claims. Since this Court has repeatedly denied petitions for writs of certiorari on this precise issue, including as recently as last year, there is no reason for this Court to now exercise its discretionary powers in this case. See e.g. Irving v. Mazda Motor Corp., 136 F.3d 764 (11th Cir. 1998), cert. denied, 119 S. Ct. 544 (1998). Moreover, this case is not the right vehicle to resolve the FMVSS preemption issue inasmuch as the Court of Appeals never reached express preemption -- thus, a ruling in this Court could not resolve the entire preemption issue. Finally, changes in the law since the subject 1987 Honda Accord was manufactured require airbags in all new passenger cars beginning September 1, 1997; therefore, this Court need not expend its judicial resources on this issue of diminishing importance.

STATEMENT OF THE CASE

A. Factual and Procedural Background

This personal injury action arises out of a single vehicle accident that occurred on January 16, 1992, at approximately 10:30 p.m. in the 4900 block of MacArthur Boulevard, N.W. in Washington, D.C. Petitioner Alexis

Geier, then 17 years old, was the driver of the vehicle, a 1987 Honda Accord LX, manufactured on July 28, 1987. Ms. Geier lost control of the vehicle after rounding a curve on MacArthur Boulevard and crashed head-on into a large tree just off the right side of the road.

In compliance with Federal Motor Vehicle Safety Standard ("FMVSS") 208 (49 C.F.R. § 571.208) in 1987, which provided manufacturers with an affirmative option to install any one of three different restraint systems, the Honda Accord was equipped with manual three-point lap and shoulder belts with a belt warning, i.e., a red light on the dash that indicated that the seat belt should be fastened.

Petitioners' complaint was filed on January 12, 1995 in the United States District Court for the District of Columbia against American Honda Motor Co., Inc., Honda of America Mfg., Inc. and Honda Motor Co., Ltd. (collectively "Honda"). The complaint asserted theories of strict products liability and breach of warranty. The sole claim is that the 1987 Honda Accord was defectively designed because it was not equipped with a driver's side air bag.

On October 26, 1995, Honda moved for summary judgment on the ground that the petitioners' common-law tort claim was expressly and impliedly preempted by the Safety Act and FMVSS 208. On December 10, 1997, Senior Judge William B. Bryant granted Honda's motion for summary judgment, and ruled that petitioners' no airbag claim was expressly preempted by federal law. The District Court found that the issues raised were not "novel," and recognized that "the federal circuit courts have unanimously concluded that a cause of action for negligence based on the failure of a car manufacturer to install airbags during the 1980s is pre-empted by federal law." App. 17-18. The District Court found that recovery on tort claims, such as that

asserted by plaintiffs, is equivalent to a safety standard promulgated by the state legislature, and such a claim is preempted by section 1392(d) of the Safety Act and FMVSS 208 because "the Federal Government has weighed the competing interests..., reached an unambiguous conclusion about how those competing interests should be resolved..., and implemented that conclusion via a specific mandate on manufacturers or producers." App. 18-19.

The Court of Appeals unanimously affirmed, holding: "Joining our sister circuits, we affirm, concluding that Geier's lawsuit is implicitly preempted." App. 2. The Court of Appeals declined to decide the express preemption question "because we conclude that a verdict in [petitioners'] favor would stand as an obstacle to the federal government's chosen method of achieving the Act's Safety objectives, and consequently, the Act implicitly preempts [petitioners'] lawsuit." App. 12.

The Court of Appeals rejected petitioners' claim that courts cannot reach implied preemption when there is an express preemption provision, relying on this Court's decision in Freightliner Corp. v. Myrick, 514 U.S. 280 (1995). The Court of Appeals, after reviewing the regulatory history, concluded that "allowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department [of Transportation's] policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems. Even if the Secretary's gradual adoption of an airbag requirement has increased public acceptance of the technology over time, concerns about public reaction still existed when Geier's 1987 Honda was manufactured." App. 15-16. Therefore, the Court held "because potential common law liability interferes with the regulatory methods chosen by the federal government to achieve the Safety Act's stated goals,...Geier's lawsuit claiming that the car she was

driving was defectively designed because it lacked airbags is implicitly preempted." App. 16.

B. The Safety Act and FMVSS 208

In 1966, Congress determined that, given the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," the country needed motor vehicle safety standards that were "strong and adequately enforced" and "uniform throughout the country." S. Rep. No. 1301, 89th Cong., 2d Sess., 12, reprinted in 1966 U.S. Code Cong. & Ad. News 2709; see H.R. Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966). Therefore, Congress concluded that "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. Rep. No. 1301, 89th Cong., 2d Sess. 4, reprinted in 1966 U.S. Code Cong. & Ad. News 2709, 2712.

Accordingly, in 1966, Congress enacted the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 et seq. ("Safety Act") (now 49 U.S.C. § 30101 et seq.). The Safety Act directs the Department of Transportation, through the National Highway Traffic Safety Administration ("NHTSA"), to issue federal motor vehicle safety standards that are "practicable," that "meet the need for motor vehicle safety," and apply throughout the country. 15 U.S.C. § 1392(a) (now 49 U.S.C. § 30111(a)). Federal motor vehicle safety standards must "protect against unreasonable risk of death or injury" in the event of an accident. 15 U.S.C. § 1391(1) (now 49 U.S.C. § 30102(a)(8)).

To ensure that the federal standards will not be undermined by application of a variety of state standards addressing the same features, Congress expressly preempted all non-identical state standards:

Supremacy of Federal standards...

> Whenever a Federal motor vehicle safety standard established under the subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment, any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard...

See 15 U.S.C. § 1392(d) (now 49 U.S.C. § 30103(b)). Explaining the need for this preemption, the House Report emphasized:

> [T]his preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than a multiplicity of diverse standards.

H.R. Rep. No. 1776, 89th Cong., 2d Sess., 17 (1966). The Senate Report stated that inconsistent standards are "preempted." S. Rep. No. 1301, 89th Cong., 2d Sess., 12 (1966).

The Safety Act also contains a provision which makes clear that Congress did not intend to occupy the entire field of automotive safety (see 15 U.S.C. § 1397(k) [currently codified at 49 U.S.C. § 30103(e)]). As the Senate Report explained, this clause ensured that "compliance with such (federal) standards would thus not necessarily shield any person from product liability at common law." S. Rep. No. 1301, 89th Cong., 2d Sess. 11, reprinted in 1966 U.S. Code Cong. & Ad. News (1966) (emphasis added). The

House Report also focused on compliance and defenses, not preemption ["compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract and tort liability"]. H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966). The role of § 1397(k) was not to negate preemption, but, as indicated in the Congressional debate, related to the evidentiary considerations of compliance with a safety standard. See 112 Cong. Rec. 21,490 (1966). Senator Cotton stated that "compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it." 112 Cong. Rec. at 21,490 (1966). Senator Magnuson made the point that "[n]o court rules of evidence are intended to be altered by this provision." 112 Cong. Rec. at 21,487 (1966).[1]

In exercising the Secretary of Transportation's authority under the Safety Act, the National Highway Traffic Safety Administration ("NHTSA") has promulgated numerous standards on motor vehicle design and performance. FMVSS 208, the occupant restraint standard, addresses the "requirements for the protection of vehicle occupants in crashes." 49 C.F.R. § 571. 208, S1. Its stated purpose is "to reduce the number of deaths of vehicle occupants, and the severity of injuries by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test

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[1] When Congress recodified the Safety Act in 1994, both § 1392(d) and § 1397(k) were appropriately placed in a new section, 49 U.S.C. § 30103, entitled "Relationship to other laws." Significantly, however, § 1392(d) was placed in 49 U.S.C. § 30103(b), labeled "Preemption," whereas § 1397(k) was placed in an entirely different subsection, 49 U.S.C. 30103(e), whose title ("Common law liability") makes no reference to the Supremacy Clause or federal preemption. See Pub. L. 103-272, § 1(e), 108 Stat. 943. Since the petitioners and the Court of Appeals used the original statutory designations, we use them as well.

crashes, and by specifying equipment requirements for active and passive restraint systems." 49 C.F.R. § 571.208, S1.[2]

NHTSA first adopted FMVSS 208 in 1967, and required installation of manual lap belts in all new cars. 32 Fed. Reg. 2415 (1967). The decision whether and when to require the installation of passive restraints, including automatic seat belts and airbags, has been the subject of extensive study, controversy, and modifications over the last three decades by NHTSA and Congress. See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987).

In 1972, the Department of Transportation amended FMVSS 208 to require installation of passive restraints (air bags or automatic seat belts) for automobile manufactured after August 15, 1975. 37 Fed. Reg. 3911 (1972). For models built before that date, manufacturers could use manual lap and shoulder belts coupled with an ignition interlock.

That standard had a short life. The public did not like ignition interlocks and made it known. Thereafter, in 1974, Congress abolished the "ignition interlock" standard. Congress also prohibited the Secretary of Transportation from issuing any standard requiring air bags or any other non-belt restraint system, among other things, unless the standard was submitted first to both houses of Congress and not disapproved by them. 15 U.S.C. § 1410(b), (c).

Thereafter, every Secretary of the Department of Transportation rejected a mandatory air bag rule. In 1976,

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[2] "Passive" restraints are "devices that do not depend for their effectiveness upon any action taken by the occupant except that necessary to operate the vehicle." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 34-35 (1983).

Secretary Coleman declined to issue a standard requiring air bags. He determined that air bags were very costly and might "cause or exacerbate injuries;" the public did not like or want them; they might precipitate "disastrous economic consequences for the whole nation;" and they provided no greater protection than seat belts when used. "The Secretary's Decision Concerning Vehicle Occupant Crash Protection," D.O.T. (Dec. 6, 1976), at 11-12, 32; 41 Fed. Reg. 24071 (June 14, 1976).

In 1977, Secretary Adams also rejected an air bags only standard. He did issue a new FMVSS 208 requiring passive restraints, either air bags or automatic belts, to be phased into automobiles in 1981. He determined not to mandate passive restraints earlier, particularly air bags, because "half of the new cars" to be manufactured in the 1980s would have to be "completely redesigned" to accommodate them. 42 Fed. Reg. 34295 (July 5, 1977).

In 1981, Secretary Lewis delayed Secretary Adams' prospective passive restraint standard, and then rescinded it. 46 Fed. Reg. 53419 (1981). The Secretary stated:

> The agency is also seriously concerned about the possibility that adverse public reaction to the cost and presence of automatic restraints could have a significant adverse effect on present and future acceptance of highway safety efforts. Id.

In 1983, this Court vacated Secretary Lewis' rescission decision, because the Secretary had not adequately set forth the reasons for it. This Court, therefore, remanded to the Secretary. See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

Thereafter, Secretary Dole undertook "a thorough review" of all restraint systems, 49 Fed. Reg. 28962 (July 17,

1984), and reached a "final decision" respecting passive restraints. She determined to require a phase-in of them, but the phase-in was not to begin if states with two-thirds of the population enacted mandatory use laws ("MULS") by 1989.

The 1984 regulation provided a three-year lead time and phase-in to allow manufacturers an opportunity to provide more reliable automatic systems, and to permit consumers the opportunity to develop more information about the benefits of these systems. 49 Fed. Reg. at 29000. The phase-in schedule required a minimum of 10% of the 1987 model year cars manufactured after September 1, 1986 to use some type of automatic protection, but not necessarily airbags, 25% of the 1988 model year cars, 40% of the 1989 model year cars, and 100% of cars from the 1990 model year and later. Id. at 28999. "By starting off with a relatively small percentage and building up to full compliance, the phase-in will provide the manufacturers with a better opportunity to manage unforeseen development and production problems and, as a result, also make it less likely that consumers will develop adverse impressions based upon earlier experience." Id. at 29000. Secretary Dole explained that the phase-in was necessary because of "the need for the public to become accustomed to the technology and the need for protection, and [because] an across-the-board mandate too quickly could engender adverse public reaction." Id. at 28989.

Secretary Dole found "a number of reasons" not to require air bags, id. at 29000, including: (1) "An air bag alone is less effective" than three point seat belts when used. Id. at 28986; (2) Air bags are costly, and are especially costly to replace. Id. at 29001; (3) Air bags may cause injuries, especially to children. Id. at 28992, 29001; (4) The public fears air bags and may not accept them; (5) Doubts about the efficacy of air bags (particularly in smaller cars). Id. at 28974, 29001; and (6) "(By) restricting the manufacturers (to

air bags), the Department runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems." Id. at 29001 (emphasis added).

To allay public concerns, Secretary Dole encouraged manufacturers to offer consumers a choice between automatic safety belts and airbags. The Secretary noted that "[i]t may be easier to overcome these [public] concerns if airbags are not the only way of complying with an automatic occupant protection requirement. Under the rule being issued, if people have concerns about airbags, they can purchase automobiles that use automatic belts." 49 Fed. Reg. at 29001.

Despite an attack on the Secretary's rejection of a mandatory airbag standard, the 1984 standard was upheld as a careful balancing of policy interests. See State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987). The Court approved the Secretary of Transportation's reliance on cost-benefit analysis and concerns about public acceptability (including fears about chemicals used to deploy airbags and the possibility of inadvertent deployment), reasoning that this analysis is "most appropriately entrusted to the expertise of an agency." 802 F.2d at 488.

In the years before the 1987 Honda Accord at issue was manufactured, NHTSA continued to refuse to mandate airbags. The agency denied a petition to reconsider the 1984 regulation, stating "Standard No. 208 does not now require, nor has it ever required, manufacturers to install air bags in their cars...Instead...any restraint system that provides the specified performance may be used to comply with the standard" (52 Fed. Reg. 42440, 42445 [1987]). Another challenge to the rule was rejected the year after this vehicle was manufactured. The agency was held to have reasonably

considered long-term safety effects in its decision. See Public Citizen v. Steed, 851 F.2d 444 (D.C. Cir. 1988).

In the 1987 model year, applicable here, Congress granted the manufacturer three options as to what restraints to install. In this vehicle, Honda chose the federally granted option of lap and shoulder belts with belt warnings. See 49 C.F.R. 571.208, S4.1.2.3. (1987).

On December 18, 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"). See Pub. L. No. 102-240. Congress directed NHTSA to amend FMVSS 208 to require, for the first time, airbags in 95% of 1997-model automobiles and 100% of 1998-model automobiles. NHTSA's final rule implementing this provision of ISTEA was promulgated in 1993. See 58 Fed. Reg. 46551. Prior to this amendment, NHTSA informed Congress that "most courts that have considered the matter have ruled that [no air bag] claims are preempted by the...Safety Act and/or the safety standards issued by NHTSA." See letter to Congress from NHTSA Administrator Jerry Curry, dated November 7, 1991. Congress responded by specifying that:

> Nothing in this section or in the amendments made under this section to [FMVSS] 208 shall be construed by any court as indicating an intention by Congress to effect, change or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.
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> Pub. L. No. 102-240 § 2508(d).

The debate over airbag technology and safety continues. In 1997, NHTSA announced the need to implement "a comprehensive plan of rulemaking and other

actions...addressing the adverse effects of airbags." 62 Fed. Reg. 798 (1997). NHTSA also issued a rule allowing manufacturers to depower airbags to address the problem of fatalities and injuries caused by airbags. 62 Fed. Reg. 12960 (1997). In 1998, Congress directed NHTSA to conduct rulemaking to improve airbags and minimize risks from airbag induced injury. Pub. L. 105-178 (1998). NHTSA, thereafter, proposed to require "smart" or "advanced airbags" to reduce potential for injury to different sized or out-of-position occupants. 63 Fed. Reg. 49958 (1998).

REASONS FOR DENYING THE PETITION

A. The District of Columbia Circuit's Ruling is Consistent with the Decisions of Other Federal Circuit Courts

All of the Federal Courts of Appeals that have addressed the FMVSS 208 preemption issue have held that a proposed state common law standard that is not identical to, or conflicts with FMVSS 208 is preempted by the Safety Act. See Geier v. American Honda Motor Co., Inc., 166 F.3d 1236 (D.C. Cir. 1999); Irving v. Mazda Motor Corp., 136 F.3d 764 (11th Cir. 1998); cert. denied, 119 S. Ct. 544 (November 30, 1998); Harris v. Ford Motor Co., 110 F.3d 1410 (9th Cir. 1997); Montag v. Honda Motor Co., 75 F.3d 1414 (10th Cir. 1996), cert. denied, 519 U.S. 814 (1996); Pokorny v. Ford Motor Co., 902 F.2d 1116 (3rd Cir.), cert. denied, 498 U.S. 853 (1990); Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), cert. denied 494 U.S. 1065 (1990); Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990); see also Gracia v. Volvo Europa Truck, N.V., 112 F.3d 291 (7th Cir. 1997), cert. denied, 118 S. Ct. 697 (1998) [holding non-identical and conflicting state common law standard on windshield

retention strength preempted under FMVSS 212]. In addition, virtually all of the federal district courts have agreed that the Safety Act and FMVSS 208 preempt common law tort claims that a vehicle is defective because it is equipped with one restraint option granted by FMVSS 208, instead of a different FMVSS 208 option.[3]

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[3]. See, e.g. Carlen v. General Motors Corp., No. 3:97-CV 606-R (W.D. Ky. November 13, 1998); Deckle v. General Motors Corp., No. 95-10021-MMP (N.D. Fla. June 5, 1998); Collins v. General Motors Corp., No. JFM-97-401 (D.Md. March 31, 1998); Lejeune v. Wallace, No. 96-1170 (E.D. La. November 12, 1997); Lightsey v. General Motors Corp., 12 F.Supp. 2d 1346 (S.D. Ga. 1997); Folkes v. Volkswagen of America, Inc., No. 94-D-977 (D. Colo. June 11, 1997); King v. Ford Motor Co., No. 95-117 (E.D. Ky April 30, 1997); McMasters v. Ford Motor Co., No. 96-110 (W.D. Pa. March 5, 1997); Schroeder v. General Motors Corp., No. 8: CV-96-591 (D. Neb. February 7, 1997); Brand v. Mazda Motor Co., 978 F.Supp. 1382 (D. Kan. 1997); Copenhaver v. Honda, No. 1: 94-CV-524 (W.D. Mich. February 6, 1997); Courtney v. Mitsubishi Motors Corp., 926 F.Supp. 223 (D. Mass. 1996); Martin v. Ford Motor Co., 914 F.Supp. 1449 (S.D. Tex. 1996); Thomas v. General Motors Corp., No. 2:96 CV 38 (E.D. Tex. December 3, 1996); Marcum v. General Motors Corp., No. 93-40 (E.D. Ky. November 21, 1996); Klugerman v. Nippon Seiko, K.K., No. 94-11900-NG (D. Mass. Nov. 20, 1996); Wiley v. General Motors Corp., No. 96-1692 (JHG) (D.D.C. November 15, 1996); Kaiser v. Fuji Heavy Industries, Ltd., No. 95-B-633 (D. Colo. Sept. 24, 1996); Schuyler v. Volkswagen A.G., No. 4:96 ev25 (E.D. Va. August 28, 1996); Taylor v. General Motors Corp., 1996 WL 671648 (N.D. Miss. Aug. 6, 1996); Waters v. Ford Motor Co., 1996 WL 114791 (E.D. Pa. March 13, 1996); Sieck v. General Motors Corp., 1996 WL 426818 (W.D. Pa. March 5, 1996); Johnson v. General Motors Corp., 889 F. Supp. 451 (W.D. Okla. 1995); Hill v. General Motors Corp., No. 94-AR0088-S (N.D. Ala. November 15, 1995); Beeman v. Lovelace, 1995 WL 813722 (W.D. Okla. November 2, 1995); Tammen v. General Motors Corp., 857 F.Supp. 788 (D. Kan. 1994); Gills v. Ford Motor Co., 829 F.Supp. 894 (W.D. Ky. 1993); Heath v. General Motors Corp., 756 F.Supp. 1144 (S.D. Ind. 1991); Cerniak v. Nissan Motor Co., 1991 WL 147366 (N.D. Ill July 26, 1991), Pak v. Chrysler Motors Corp., 1990 WL 198821 (E.D. Pa. December 3, 1990), aff'd, 941 F.2d 1200 (3rd Cir. 1991); Dallas v. General Motors Corp., 725 F.Supp. 902 (W.D. Tex. 1989); Hunt v. Ford Motor Co., Prod. Liab. Rep. (CCH) ¶ 12,292 (N.D. Ala. March 30, 1989); Kelly v. General Motors Corp., 705 F.Supp. 303 (W.D. La. 1988); Kolbeck v. General Motors Corp., 702 F.Supp. 532 (E.D. Pa. 1988); Surles v. Ford Motor Co., 709 F.Supp. 732 (N.D. Tex. 1988); Heftel v. General Motors Corp., 1988 WL 19615 (D.D.C. February 23, 1988); Hunter v. General Motors Corp., Prod. Liab. Rep. (CCH) ¶ 12,039 (D. Conn. December 27, 1988); Howard v. American Motors Corp., Prod. Liab. Rep. (CCH) ¶ 11,995 (S.D. Tex. July 26, 1988); Schick v. Chrysler Corp., 675 F.Supp 1183 (D.S.D. 1987); Staggs v. Chrysler Corp., 678 F.Supp. 270 (N.D. Ga. 1987); Hughes v. Ford Motor Co., 677 F. Supp. 76 (D. Conn. 1987); Wattelet v. Toyota Motor Corp., 676 F.Supp. 1039 (D. Mont. 1987; Bass v. General Motors Corp., 1987 WL 54449 (W.D. Tex 1987); Vasquez v. Ford Motor Co., 1986 WL 18670 (D. Ariz. November 18, 1986); Cox v. Baltimore County, 646 F.Supp. 761 (D. Md. 1986); Baird v. General Motors Corp., 654 F.Supp. 28 (N.D. Ohio 1986); Vanover v. Ford Motor Co., 632 F.Supp. 1095 (E.D. Mo. 1986).

In addition, appellate courts in nine states have found preemption of passive restraint claims.[4] Just recently, the Appellate Court of Illinois in Hilst v. General Motors Corp., 1999 WL 339029 (Ill. App. May 26, 1999), concluded that "the plaintiffs' cause of action would indeed subvert the statutory and regulatory scheme presently in place, and following the Federal Court of Appeals' decisions," including the District of Columbia Circuit Court of Appeals, held that the no-airbag claim is impliedly preempted by federal law. Since the vast majority of cases have held no airbag claims preempted, the small number of state courts

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[4] Cellucci v. General Motors Corp., 706 A.2d 806 (Pa. 1998); Cooper v. General Motors Corp., 702 So.2d 428 (Miss. 1997); Martinez v. Ford Motor Co., 568 N.W.2d 396 (Mich. App. 1997); Schlotz v. Hyundai Motor Co., 557 N.W.2d 613 (Minn. App. 1997), cert. denied, 118 S. Ct. 80 (1997) [no lap belt claim preempted]; Zimmerman v. Volkswagen of America, Inc., 920 P.2d 67 (Idaho 1996), cert. denied, 520 U.S. 1115 (1997) [no lap belt claim]; Dykema v. Volkswagen A.G., 525 N.W.2d 754 (Wis. App. 1994), cert. denied, 516 U.S. 811 (1995) [no lap belt claim]; Miranda v. Fridman, 647 A.2d 167 (N.J. App. 1994), cert. denied, 649 A.2d 1291 (N.J. 1994) [no lap belt claim]; Boyle v. Chrysler Corp., 501 N.W.2d 865 (Wis. App. 1993), rev. denied, 510 N.W.2d 137 (Wis. 1993); Nissan Motor Corp. v. Superior Court, 212 Cal. App. 3d 980 (1989), cert. denied 494 U.S. 1066 (1990); Wickstrom v. Maplewood Toyota, Inc., 416 N.W.2d 838 (Minn. App. 1987); cert. denied, 487 U.S. 1236 (1988).

that have held to the contrary do not warrant exercise of this Court's discretionary powers. None of these state courts have yet rendered a final decision that would properly invoke this Court's jurisdiction under Jefferson v. City of Tarrant, 522 U.S. 75 (1997).

B. Nothing New Has Occurred Since This Court's Denial of Certiorari Last Year

It is not surprising that this Court has declined to review the FMVSS preemption issue fourteen times, including two cases just last year. See Irving v. Mazda Motor Corp., 136 F.3d 764 (11th Cir. 1998), cert. denied, 119 S. Ct. 544 (1998), Gracia v. Volvo Europa Truck, N.V., 112 F.3d 291 (7th Cir. 1997), cert. denied, 118 S. Ct. 697 (1998).[5] All of the state court cases relied upon by petitioners were decided before this Court's denial of the petition for certiorari in Irving v. Mazda Motor Corp., supra. There is nothing new in the Court of Appeals ruling here that should

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[5] Other cases where this Court has denied a petition for a writ of certiorari also involved the preemptive effect of occupant restraint system options under FMVSS 208. See Schlotz v. Hyundai Motor Co., 557 N.W.2d 613 (Minn. App. 1997), cert. denied, 118 S. Ct. 80 (1997); Zimmerman v. Volkswagen of America, Inc., 920 P.2d 67 (Idaho 1996), cert. denied, 520 U.S. 1115 (1997); Montag v. Honda Motor Co., 75 F.3d 1414 (10th Cir. 1996), cert. denied, 519 U.S. 814 (1996); Tebbets v. Ford Motor Co., 665 A.2d 345 (N.H. 1995), cert. denied, 516 U.S. 1072 (1996); Dykema v. Volkswagen A.C., 525 N.W.2d 754 (Wis. App. 1994), cert. denied, 516 U.S. 811 (1995); Hyundai Motor Co. v. Phillip, 639 So.2d 1064 (Fla. App. 1994), cert. denied, 513 U.S. 1111 (1995); Pokorny v. Ford Motor Co., 902 F.2d 1116 (3rd Cir.), cert. denied, 498 U.S. 853 (1990); Nissan Motor Corp. v. Superior Court (Meier), 212 Cal. App. 3d 980 (1989), cert. denied, 494 U.S. 1066 (1990); Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990); Wickstrom v. Maplewood Toyota, Inc., 416 N.W.2d 838 (Minn. App. 1987), cert. denied, 487 U.S. 1236 (1990).

cause this Court to reconsider all of its many denials of certiorari. If anything, the Court of Appeals reaffirmed the correct approach in following the other circuits and multitude of district courts on the FMVSS preemption issue.

Ignoring the repeated denials of certiorari, petitioners contend that "the issue of airbag preemption has grown increasingly ripe for review." Pet. at 12. All of the cases relied upon by petitioners, however, predated this Court's most recent denial of certiorari in Irving v. Mazda Motor Corp. Indeed, the most recent appellate decisions on FMVSS preemption, the Court of Appeals decision here and the Appellate Court of Illinois in Hilst v. General Motors Corp., supra, correctly found that petitioners' common law claim would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and the federal regulatory scheme.

C. Review is Not Warranted Where the Entire FMVSS Preemption Issue is Not Before This Court

The Court of Appeals decided only the implied preemption portion of the total FMVSS preemption issue; the Court did "not resolve whether Geier's claim is expressly preempted." App. 12. Thus, even if this Court disagreed with the Court of Appeals on the implied preemption issue, a remand to the Court of Appeals would be in order to first decide the express preemption issue. This Court ordinarily will not address questions that were not decided below, and were not presented in the petition for certiorari. See Blessing v. Freestone, 520 U.S. 329, 340 (1997); Supreme Court Rule,14.1(a). The parties have not, except in passing, briefed the express preemption sub-issue before this Court. "It is generally more efficient for the Supreme Court to await an appeal from a final judgment which allows the Court to

consider all issues in a single certiorari package." Shapiro, Certiorari Practice: The Supreme Court's Shrinking Docket, 24 No. 3 Litigation 25 (1998).

Honda submits that, if review is ever warranted, this Court should select a better case for review – one that has actually decided both the express and implied components of the FMVSS preemption issue. Review here would not dispose of the entire controversy, and would not meaningfully assist in the development of preemption law.

D. Due to the Change in Federal Law Mandating Airbags, the Issue of FMVSS 208 Preemption is of Diminishing Importance

Petitioners suggest that the FMVSS preemption issue is somehow increasing in importance. We strongly disagree. The ever-evolving nature of FMVSS 208, and the changes in the law as it relates to airbag technology, demonstrate that the claims presented by petitioners will surely fall by the wayside as vehicles manufactured without airbags cease to be driven. Petitioners greatly exaggerate the number of future no-airbag claims. Pet. At 11. All cars manufactured after September 1, 1997 are required to have airbags. App. 3. In addition, numerous manufacturers before that time voluntarily equipped their cars with airbags. Consequently, the number of remaining no-airbag suits has steadily declined during the phase-in period and will continue to do so.

In any event, this Court should not exercise its discretionary powers to render a decision based on a phase-in regulation that has since been replaced with a permanent rule mandating airbags in all vehicles. Where the statute or regulation upon which a controversy rests has been amended in a manner which prevents the problem from arising in the

future, certiorari should be denied. See Robert L. Stern, et al., Supreme Court Practice 172 (7th ed., 1993).[6]

E. The District of Columbia Circuit Correctly Applied Controlling Supreme Court Precedents

Review is also not warranted because the District of Columbia Circuit's decision correctly applied traditional implied preemption analysis. Federal law impliedly preempts state law "to the extent it actually conflicts with federal law." California Federal Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272, 281 (1987); see International Paper Co. v. Ouellette, 479 U.S. 481, 491 (1987). Such conflicts occur where the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941); see Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co. 450 U.S. 311, 317 (1981).

There is an actual conflict if there is a "prospect of interference with the federal regulatory power," Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 310 (1988), or if the state law "interferes with the methods by which the federal statute was designed to reach [its] goals[s]." International Paper Co. v. Ouellette, 479 U.S.

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[6] The decision below is also unsuitable for review because the 1987 Honda Accord at issue was manufactured and sold during the passive restraint phase-in period (1987-1989), when manufacturers had to install passive protection systems in only a percentage of their new cars. Contrary to Petitioner's suggestion (Pet. at 22), the United States did not believe review was warranted for cases involving 1987 phase-in vehicles, but believed that the vehicle should be manufactured after the phase-in period was completed in 1990, before a suitable case might be presented for certiorari. See Brief of the United States as Amicus Curiae, on Petition for Writ Certiorari at 19-20, Wood v. General Motors Corp., 494 U.S. 1065 (1990) (No. 89-46) [recognizing "difficult issues" relating to phase-in vehicles].

481, 494 (1987); Michigan Canners and Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 477 (1984). Authorized regulations of an agency will preempt any state law that conflicts with such regulations or frustrates regulatory purposes. See City of New York v. F.C.C., 486 U.S. 57 (1988); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982) ["federal regulations have no less preemptive effect than federal statutes"].

Petitioners spend much of their Petition (Pet. 13-20) arguing that this Court's decision in Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) radically changed federal preemption law and precludes resort to implied preemption analysis in the face of an express preemption clause. But this Court unanimously rejected this position as "without merit" in Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995); see also Medtronic, Inc. v. Lohr, 518 U.S. 470, 503 (1996) [rejecting express preemption argument but stating that tort claim might "be preempted under conflict preemption analysis"]. The Myrick court held that "the fact that an express definition of the preemptive reach of a statute 'implies' - - i.e., supports a reasonable inference - - that Congress did not intend to preempt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption." The Myrick court noted (1) that in Cipollone, "we engaged in a conflict preemption analysis of the Federal Cigarette Labeling and Advertising Act," and (2) "our subsequent decisions have not read Cipollone to obviate the need for analysis of an individual statute's preemptive effects. See, e.g., CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993)." Myrick, 514 U.S. at 288-89. Finally, the Myrick court actually applied the traditional implied preemption test - whether the lawsuit frustrates "the accomplishment and execution of the full purposes and objectives of Congress." Id. Since there was no federal antilock braking standard, there were "no federal objectives or purposes" to undermine. Id. Simply put, in

1996, this Court considered implied preemption under the very same statute. The Court of Appeals could do no less.

Petitioners' contention is further undercut by this Court's decision in Medtronic, Inc. v. Lohr, supra, where the defendant manufactured a pacemaker without any premarket review by the FDA, and needed to comply only with the FDA's general rules regulating manufacturing processes and designs. A majority of this Court held that general FDA regulations applicable to all medical devices, as opposed to FDA regulations specific to a particular device, do not preempt common-law actions because there was no analysis by the federal government about the particular requirement in question. 518 U.S. at 501. However, a majority of this Court signaled that if there is a "substantive requirement for a specific device," there is no need to reach the express preemption issue "if the claim would also be preempted under conflict preemption analysis." 518 U.S. at 503; see also 518 U.S. at 507 (Justice Breyer's concurring opinion citing to "ordinary principles of 'conflict'... preemption").

Nothing in the Cipollone opinion suggests that this Court overruled prior preemption decisions, or charted new ground. It is implausible that the Cipollone court intended to silently repudiate a long line of preemption decisions accepting implied preemption arguments regarding statutes with express preemption clauses. See e.g., Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990); Jones v. Rath Packing Co., 430 U.S. 519, 540 (1977). Indeed, this Court, just six days before Cipollone, found implied preemption notwithstanding the existence of an express preemption clause. See Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 104 (1992) ("the implications of the text of the statute evince a congressional intent to preempt non-approved state regulations when a federal standard is in effect").

Subsequent decisions of this Court also demonstrate that there may be implied preemption in federal statutes with express preemption clauses. See CSX Transp. Inc. v. Easterwood, 507 U.S. 658 (1993); John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993).

In sum, the Court of Appeals properly determined that "the tension between §§ 1392(d) and 1397(k) prevents the identification of any 'express definition' of the reach of preemption in the Safety Act"; therefore "Cipollone does not bar this Court from considering Honda's implied preemption argument." App. 13.

F. A Common Law Rule Requiring Airbags in 1987 Vehicles Would Destroy The Options and Flexibility at the Heart of FMVSS 208

The Court of Appeals rightfully recognized that the effect of allowing petitioners' no-airbag claim to proceed would "frustrate the Department's policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems". App. 15. The Court analyzed the regulatory history, and noted that "a performance standard making airbags one of several options car manufacturers could choose to comply with the passive restraint requirements of standard 208, rather than mandating specific use of one safety device, would advance public safety in two respects, by allowing consumers to adjust to the new technology and by permitting experimentation with designs for even safer systems. 49 Fed. Reg. at 28,988, 28,997." App. 15.

The District of Columbia Circuit, of course, is uniquely experienced in the analysis of federal regulatory schemes both in general and in the particular context of FMVSS 208. See e.g. Motor Vehicle Mfrs. Ass'n. of the

United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474 (D.C. Cir. 1986), cert, denied, 480 U.S. 951 (1987); Public Citizen v. Steed, 851 F.2d 444 (D.C. Cir. 1988) [opinion by then Circuit Judge Ruth Bader Ginsburg].

Petitioners' asserted common law standard takes away the federally mandated options and flexibility. See Pokorny v. Ford Motor Co., 902 F.2d 1116 (3rd Cir. 1990). In Pokorny, the Third Circuit held that allowing plaintiff to assert a no-airbag claim "frustrates the goals of the federal regulatory framework and undermines the flexibility that Congress and the Department of Transportation intended to give to automobile manufacturers in this area." The Eleventh Circuit in Taylor v. General Motors Corp., 875 F.2d 816, 827 (11th Cir. 1989) similarly noted that, if no-airbag claims are allowed, this would "remove the element of choice authorized in Safety Standard 208," would "take away the flexibility provided by a federal regulation" and would thus "frustrate the regulatory scheme."

Moreover, the District of Columbia's decision is in harmony with a number of this Court's decisions on preemption. See, e.g., American Tel. and Tel. Co. v. Central Office Tel. Inc., 524 U.S. 214 (1998) [preempting state law claims that sought to bar activity authorized by federal statute]; Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996) [preempting state law that prohibited activity expressly permitted by federal statute]; CSX Transp. Inc. v. Easterwood, 507 U.S. 658 (1993) [holding common law standard based on train speed specifically permitted by an applicable federal standard was preempted]; Fidelity Fed. Sav. And Loan Ass'n v. de la Cuesta, 458 U.S. 141, 156 (1982) [finding preemption of common law claim seeking to prohibit use of due-on-sale clause explicitly permitted by federal statute]; Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325-26 (1981) [holding that a state

could not use "the threat of damages" to prevent the defendant from doing that which the federal agency specifically allowed under its duly-delegated authority].

G. Section 1397(k) of the Safety Act Does Not Preserve Preempted State Claims

Petitioners argue that there can be no preemption of any common law claim because of § 1397(k), which petitioners mischaracterize as an "anti-preemption provision." Pet. at 25. In fact, § 1397(k): (1) never mentions the word "preemption," (2) never addresses the preemption clause, and (3) is located several sections apart from the preemption clause. While respondents have no quarrel with the rule that words in a statute should be given their plain and ordinary meaning, petitioners' discussion of an "anti-preemption provision" goes well beyond the actual words of the statute.

Section 1397(k) provides:

> Compliance with any federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Several factors indicate that § 1397(k) was not intended to be a provision that relates to the issue of preemption. The Court of Appeals cited Harris v. Ford Motor Co., 110 F.3d 1410, 1415 (9th Cir. 1997) for the proposition that "the most reasonable and plausible reading of § 1397(k) ... is that compliance with federal standards does not exempt anyone from liability that the states have authority to impose." § 1397(k) merely negates the availability of compliance with all government standards as an affirmative defense to common law actions. See Gracia v. Volvo Europa Truck, N.V., 112 F.3d 291, 298 (7th Cir. 1997); see also Wood v. General Motors Corp., 865 F.2d

395, 417 (1st Cir. 1988) [compliance is not a complete defense "on the merits of a defective design claim"].

The narrow language of § 1397(k) - "compliance with any federal motor vehicle safety standard" - is much narrower than the two exceptions incorporated into Section 1392(d), which are true savings clauses. Each of these two savings clauses (for enforcement of identical state standards and for vehicles bought for the state's own use) begin with the clear traditional savings language, "Nothing in this section shall be construed." The two savings clauses in 1392(d) state:

> Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use of such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard (emphasis added).

True savings clauses use broader language, not the narrow "compliance with" language of § 1397(k). See Wood v. General Motors Corp., supra. 865 F.2d at 401, n. 8, 417-18.[7] Moreover, as this Court has recognized, "the

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[7] See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993) [interpreting savings clause of Employee Retirement Income Security Act, 29 U.S.C. § 1144(b)(2)(A), which states that the statute "shall not be construed to exempt or relieve any person from any law of any state which regulates insurance banking, or

evidence of preemptive purpose is sought in the text and structure of the statute at issue." CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993). Here, § 1397(k) appears a full five sections after 1392(d), evidence it was not intended to address preemption. § 1392(d) is entitled "Supremacy of Federal Standards." §1397(k) makes no reference to the Supremacy Clause. This further reinforces the conclusion that 1397(k) was never intended to create a sweeping exception to Section 1392(d).

Moreover, the legislative history demonstrates that the purpose of § 1397(k) was only to negate the evidentiary defense of compliance with federal standards ["compliance with federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it"] (112 Cong. Rec. at 21,490); ["This provision does not prevent any person from introducing in a lawsuit evidence of compliance or non-compliance with federal standards. No court rules of evidence are intended to be altered by this provision"] (112 Cong. Rec. at 21,487). Compliance as a defense on the merits, of course, is entirely different from preemption. See Wood v. General Motors Corp., supra, 865 F.2d at 417. Moreover, the legislative history does not speak to conflict preemption, and does not "specifically address the status of conflicting design standards established through the mechanism of common law suits." See Wood v. General Motors Corp., supra, 865 F.2d at 406. If anything, the

securities"]; Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992) [interpreting savings clause of Federal Aviation Act of 1958, 49 U.S.C. § 1506, which states, "nothing...in this chapter shall in any way abridge or alter the remedies now existing as common law or by statute, but the provisions of the chapter are in addition to such remedies"]; Cipollone v. Liggett Group, Inc., 505 U.S. at 518 (1992) [referring to savings clause of Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4406(c), which states, "nothing in this Act shall relieve any person from any liability, under common law or under state statutory law, to any other person"].

legislative history stresses the need for uniformity of standards. See, e.g., 112 Cong. Rec. at 14253 (conflicting standards would be "chaotic") [remarks of President Johnson].

There is an "important distinction" between federal preemption and "the question of whether and to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness." See Restatement (Third) of Torts: Products Liability, § 4, cmt. e (Proposed Final Draft 1997). The legislative history's reference to "evidence" and "relevance" establishes that the States will have the flexibility to determine whether a party's compliance with pertinent federal requirements can serve as the basis for an affirmative defense under state law. In practice, the States have differed on this issue of state law.[8]

In any event, even if § 1397(k) is deemed to be a true savings clause, a century of cases from this Court makes clear that even a broad savings clause cannot save state law that directly conflicts with federal law. As this Court recognized: an act "cannot in reason be construed as continuing...a common law right, the continued existence of which would be absolutely inconsistent with the provisions

[8] Some states recognize a rebuttable presumption that a product complying with federal standards is not defective. See, e.g. Mich. Comp. L. Ann § 600.2946(4) (West 1997); Kan. Stat. Ann. § 60-3304(a) (1996). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive or presumptive evidence. E.g., Wagner v. Clark Equip. Co., 700 A.2d 38, 49-50 (Conn. 1997); Brooks v. Beech Aircraft Corp., 902 P.2d 54, 63 (N.M. 1996). A few States hold that compliance conclusively negates any defect, see, e.g., Beatty v. Trailmaster Prods, 625 A.2d 1005, 1013-14 (Md. 1993), while others treat compliance as irrelevant and inadmissible, see, e.g., Sheehan v. Cincinnati Shaper Co., 555 A.2d 1352, 1355 (Pa. Super. 1989). § 1397(k) was enacted because Congress decided that the states should continue to maintain diverse views on this issue.

of the act"; an act "cannot be read to destroy itself." Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907). That principle stands to this day. See American Tel. And Tel. Co. v. Central Office Tel. Inc., 524 U.S. 214, 1965 (1998); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992); Chicago N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 328-31 (1981).

Thus, the Circuit Courts of Appeals have agreed that "[g]eneral savings clauses may not be read literally to permit common law actions that contradict and subvert a statutory scheme." Wood v. General Motors Corp., supra., 865 F.2d at 415; see also Taylor v. General Motors Corp., supra, 875 F.2d at 827 n.20 [a "general savings clause, such as that contained in the Safety Act, does not "foreclose a finding of implied preemption"]; Pokorny v. Ford Motor Co., supra, 902 F.2d at 1125 ["it is well-established that a savings clause like § 1397(k) does not 'save' common law actions that would subvert a federal statutory or regulatory scheme"]; see also Miranda v. Fridman, 647 A.2d 167, 174 (N.J. App. Div. 1994) ["[I]t demeans Congress to conclude" that it "purposely wrote the savings clause to tear down the barrier against inconsistent state regulation that the preemption clause was written to erect"].

In sum, the Court of Appeals correctly determined that a statute should not be interpreted to destroy itself, or to strip itself of its intended efficacy.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Dated: July 9, 1999

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IN THE

Supreme Court of the United States

Alexis Geier, *et al.*,

Petitioners,

v.

American Honda Motor Company, Inc., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Our petition gave three reasons why this Court should grant review. First, the federal courts of appeals and state courts of last resort are hopelessly in conflict over whether federal law preempts a claim that a car is defective because it lacks an airbag. Second, this conflict is partly attributable to this Court's decision in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), which created massive confusion over whether it is appropriate to consider implied conflict preemption where Congress' plain language expressly preserves common law claims. Third, whether the Safety Act preempts common law claims is an important question of federal law warranting this Court's review.

In response, Honda argues that review should be denied because: (1) there is no serious conflict among the lower courts; (2) this Court has recently denied review in other Safety Act cases; (3) this case involves only the question of implied preemption; (4) the issue is not important because airbags are now required in all vehicles; and (5) the decision below is correct. None of these arguments withstands scrutiny.

1. As explained in our petition at 7-13, there is in fact a deep split among the lower courts on the precise question presented in this case: whether a manufacturer may be sued for failing to install airbags in one of its vehicles. Honda attempts to minimize this conflict by arguing that only a "small number of state courts" have held that no-airbag claims are preempted by federal law. Opp. at 15-16. This is an understatement of the first order given that, in the last five years, *five* state courts of last resort have decided the question in a manner directly contrary to all five federal courts of appeals to consider the issue. Pet. at 7-9.

Honda does not attempt to argue that these state court decisions are not truly in conflict with the federal rulings.

Instead, it pretends that a state/federal split of this magnitude is insignificant given the unanimity of the federal courts of appeals. This, of course, is not the law. *See* Supreme Court Rule 10(a); Stern, *Supreme Court Practice 7th Edition*, § 4.9, at 181 (1993). In fact, this Court has often granted review in preemption cases based on a conflict between federal courts of appeals and state courts of last resort. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508-09 nn.2 & 3 (1992) (citing split between five federal courts of appeals and two highest state courts as basis for granting review of cigarette labeling preemption decision); *Lewis v. Brunswick*, 107 F.3d 1494 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 439 (1998) (granting review of boat safety preemption decision based on split between two federal courts of appeals and one highest state court). Thus, Honda's argument that there is insufficient conflict below to warrant review here – where there is a much deeper split than gave rise to either *Cipollone* or *Lewis* – is simply unavailing.[1]

Honda's related argument that the conflict below does not warrant review because "[n]one of the[ ] state courts have yet rendered a final decision that would properly invoke this Court's jurisdiction under *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997)" (Opp. at 16) is equally meritless. *Jefferson* held that this Court lacks authority under 28 U.S.C. § 1257(a) to review a non-final, interlocutory decision rendered by a state court of last resort. *See* 522 U.S. at 81. Even if this doctrine would

[1] Honda also attempts to portray the five state high-court decisions as insignificant, in part, by citing a string of lower court federal and state cases that have found preemption of no-airbag claims. But there are scores of lower federal and state court cases that reached the opposite conclusion, too. *See generally Cellucci v. General Motors Corp*, 706 A.2d 806, 812 n.4 (Pa. 1998) (collecting cases); *Cooper v. General Motors Corp.*, 702 So.2d 428, 433-34 (Miss. 1997) (same).

have prevented review of the five state high-court decisions finding no preemption, this Court clearly has jurisdiction under 28 U.S.C. § 1254(1) to review the decision below rendered by a federal court of appeals. *See generally* Stern, *Supreme Court Practice 7th Edition*, § 2.2, at 40 (1993). Indeed, this Court has regularly reviewed decisions of *federal* courts of appeals in the tort preemption context absent the finality required for state court decisions required under Section 1257(a). *E.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 482-84 (1996) (medical device preemption case reviewed on defendant's petition for *certiorari* prior to trial on remand). Thus, there is no question that the Court possesses jurisdiction to review this case (and Honda does not contend otherwise).

Honda's finality argument also fails because, even if the state decisions were not final for purposes of this Court's review at the time they were rendered, they are (and will remain) the law of the land in those jurisdictions absent an intervening decision from this Court. Not only does this create a liability patchwork among the state and federal courts but, in cases where a state court of last resort has disagreed with the federal court of appeals in its geographic area, the preemption question in that state hinges solely on whether a case is filed in state or federal court. *Compare, e.g., Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) (holding implied preemption of no-airbag claims) *with Tebbetts v. Ford Motor Co*, 665 A.2d 345 (N.H. 1995), *cert. denied*, 516 U.S. 1072 (1996) (holding no express or implied preemption of same). This perverse result can only be remedied by review by this Court.

2. Honda also makes much of the fact that this Court denied review in two recent cases involving preemption under the Safety Act. *See* Opp. at 16 (citing *Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir. 1998), *cert. denied*, 119 S. Ct.

544 (1998), *and Gracia v. Volvo Europe Truck, N.V.*, 112 F.3d 291, 297 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 697 (1998)). This argument, too, misses the mark.

First, Honda ignores that this Court *did* grant review in a recent Safety Act case – *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) – that, by all appearances, seemed to present exactly the same question as this case: whether the Safety Act preempts common law no-airbag claims. *See* Pet. at 11-17 & nn.7, 13. This Court ultimately decided the case on other grounds, leaving the preemption question for another day. 514 U.S. at 287. Thus, as of 1995, this Court viewed the preemption question presented here as sufficiently important to warrant review.

This Court's denial of *certiorari* in two recent Safety Act cases does not signal a retreat from the decision to grant review in *Myrick*. First, *Gracia* was not even a no-airbag case; rather, it involved a defective windshield claim. *See* 112 F.3d at 293. Tellingly, the Seventh Circuit's decision did not even mention (much less analyze or rely upon) any of the myriad federal or state decisions regarding airbag preemption. Equally important, *Gracia* is aberrational insofar as it holds that the Safety Act *expressly* preempts common law claims. *See id.* at 298. (As explained in the petition at 9-10 & n.5, all but one of the federal courts of appeals to decide the question have concluded that no-airbag claims are impliedly – but not expressly – preempted by Standard 208.) Because *Gracia* was decided on express preemption grounds, the Seventh Circuit never addressed whether a court may properly consider implied conflict preemption in the face of a statute – like the Safety Act – that appears expressly to *preserve* common law claims. Yet that precise question is the core of the split between the federal and state courts in the airbag preemption cases. *See* Pet. at 10-11. Thus, *Gracia* did not even come close to presenting the

question presented here, rendering this Court's denial of *certiorari* in that case wholly irrelevant.

Irving was a similarly unsuitable vehicle for review. First, like *Gracia*, that case did not squarely present a claim that a vehicle was defective because it lacked an airbag; rather, the plaintiff's claim was that his vehicle was defectively designed because the manufacturer failed adequately to warn of the risk of not using all components of the safety belt system. *See* 136 F.3d at 767. *Irving* was also beset with procedural irregularities, including extensive uncertainty over whether certain claims had been preserved for review. *See id.* at 768-69. Thus, it is not surprising that this Court declined to select *Gracia* or *Irving* to resolve the question first presented – but ultimately left unanswered – by *Myrick*.[2]

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[2] Since *Myrick*, this Court has denied review in four other Safety Act cases – *Tebbetts*, 665 A.2d at 345; *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 519 U.S. 814 (1996); *Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67 (Idaho 1996), *cert. denied*, 520 U.S. 1115 (1997); and *Schlotz v. Hyundai Motor Co.*, 557 N.W.2d 613 (Minn. Ct. App.), *cert. denied*, 522 U.S. 823 (1997). In *Tebbetts*, the respondent successfully opposed review on the ground that the New Hampshire Supreme Court's decision finding no preemption was the first ruling by a state court of last resort or a federal appeals court on the preemptive effect of the Safety Act since this Court clarified the limits on implied preemption in *Cipollone* and *Freightliner* – and that there was, therefore, no post-*Cipollone* conflict. Brief in Opposition at ii, *Tebbetts*, No. 95-709 (October Term, 1995). In *Montag*, the Tenth Circuit created such a conflict by finding preemption, but Ford successfully argued that review should be denied because the case was decided on alternative grounds and did not squarely present the preemption issue. Respondents' Brief in Opposition at v, *Montag* (No. 95-1885). In *Zimmerman* and *Schlotz*, the auto manufacturers successfully opposed review on the ground that the cases involved lap belts rather than airbags and, in *Schlotz*, that there was an independent and adequate state ground for the decision. Respondents' Brief in Opposition at 10-14, *Zimmerman* (No. 96-904); Respondents' Brief in Opposition at 1-2, *Schlotz* (No. 96-2032). Thus, none

3. Honda's third argument is that review should be denied because "the entire preemption question is not before the Court." Opp. at 17. In reality, as Honda knows, both express and implied preemption were squarely presented to the courts below. The district court held that petitioners' claims were expressly preempted by the Safety Act. *See* App. 19-20. On appeal, petitioners argued that their claims were neither expressly nor impliedly preempted. The D.C. Circuit considered and addressed the express preemption question at some length, *see id.* at 8-12, acknowledging that the Safety Act's "broadly worded savings clause . . . indicates that Congress did not wish to deprive plaintiffs of all their remedies at common law." App. 11. Although the Court ultimately declined to resolve the express preemption question, *id.* at 12, ruling instead that petitioners' claims are impliedly preempted by Standard 208, *id.* at 14-16, there is no question that both issues were presented below and preserved for review by this Court.

Similarly, both express and implied preemption were encompassed within the petition and, therefore, properly presented to this Court. Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." The first question presented, by its terms, raises the entire issue of preemption; it does not separately mention, much less distinguish between, express and implied preemption. Moreover, the petition discusses both express and implied preemption at length – in reviewing the conflict among the lower courts, the confusion caused by *Myrick*, and the importance of the federal question presented. The petition even explains how the Safety Act's plain language and legislative

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of these cases was a suitable vehicle for answering the question presented here: *i.e.*, whether no-airbag claims are preempted by federal law.

history illustrate Congress' intent expressly to *preserve* common law claims, thereby barring any resort to implied preemption analysis. *See, e.g.*, Pet. at 23-24. Finally, the petition argues that, given the similarity between the Safety Act's express preemption provisions and those of various other statutes, "[t]his case . . . presents the opportunity to resolve the broader question presented in all of these cases: whether a plainly worded savings clause appearing expressly to preserve common law claims may be disregarded to find preemption by virtue of a manufacturer's compliance with minimum federal safety standards." *Id.* at 26.

Well aware of these facts, Honda vigorously argues in its opposition that petitioners' claims are both expressly and impliedly preempted. *See* Opp. at 24-28 (express), 19-24 (implied). The entire question of preemption is, therefore, plainly before this Court.

In fact, this case is particularly appropriate for review given that the D.C. Circuit's refusal to decide the issue of express preemption is actually at the core of the conflict below. As explained in the petition at 10-11, the federal courts of appeals and five state courts of last resort fundamentally disagree on whether it is *ever* appropriate to reach the issue of implied conflict preemption in the face of statutory language appearing expressly to preserve common law claims. In the state courts' view, a court is barred from even considering implied conflict preemption without first deciding whether the statutory language expressly preempts (or saves) common law claims. The federal courts, in contrast, reject this approach, holding that implied conflict preemption may exist even in the face of clear statutory language expressly preserving common law claims. Following this approach, the D.C. Circuit declined to resolve the issue of express preemption, finding implied conflict preemption instead.

At bottom, then, a central issue in this case is whether the lower court erred in refusing to decide the express conflict preemption issue. Honda's attempt to twist this refusal into a reason to *deny* review is unavailing and should be rejected.

4. Honda also argues that review should be denied because "[a]ll cars manufactured after September 1, 1997 are required to have airbags" (Opp. at 18) and thus the issue will eventually disappear. This argument is belied by Honda's previous statements and is factually inaccurate.

First, Honda's claim of "diminishing importance" is flatly contrary to its *amicus* brief filed in support of the petition for *certiorari* in *Ford Motor Company v. Tebbetts*, No. 95-709 (October Term, 1995). *See* Pet. at 21-22. In that brief, Honda and its fellow auto manufacturers asked this Court to review the New Hampshire Supreme Court's decision on the ground that federal preemption of no-airbag claims "is an issue of exceptional importance affecting national automobile safety . . .." *Id.* The auto manufacturers added that there are "*literally millions of automobiles on the road today that are not equipped with airbags*," and that "[l]itigation over the preemptive effects of [Standard] 208 has proceeded for a decade, *with no end in sight*. . . . Only this Court can put an end to this controversy." *Id.* (emphases added). In light of these representations made only a few years ago in a case involving the identical question presented here, it is disingenuous at best for Honda to claim now that review is unwarranted and that "[p]etitioners greatly exaggerate the number of future no-airbag claims." *Id.* at 18.

Honda's argument is also wrong on the facts. As Honda admits, federal law only required airbags as of September 1, 1997. Cars, of course, often stay on the road for years and years. In fact, the automobile at issue in this case was manufactured over *12 years ago*, yet petitioners are only now

presenting their arguments to this Court. Thus, at a minimum, no-airbag claims will continue to be litigated for at least another decade – and probably much longer. Unless this Court intervenes, the chaos among the lower courts will continue and spread, with victims' right to seek compensation depending solely on whether they happen to reside in a no-preemption jurisdiction.

Finally, this case has ramifications far beyond the airbag context. Not only is preemption an open question with respect to other types of cases arising under the Safety Act, *e.g.*, *Gracia*, 112 F.3d 291 (windshields); *Irving*, 136 F.3d 764 (manual lap belts), but the Safety Act's express preemption provision and savings clause are strikingly similar to the language of many other statutes. *See* Pet. at 25. Thus, a decision in this case could affect preemption analysis in a broad range of cases far beyond the no-airbag context. Honda's attempt to minimize the importance of this case is accordingly without merit.[3]

5. Honda's last argument – that the lower court's implied preemption decision is right – is not a reason for denying review. To the contrary, it starkly underscores the need for this Court to step in and resolve both the dispute and the massive conflict among the lower courts. Moreover, as explained above, five state courts of last resort have held that, in view of the Safety Act's remarkably clear savings clause, it

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[3] Honda also argues that the decision below is "unsuitable for review" because petitioners' car was manufactured during the phase-in period (1987-89) when manufacturers had to install passive protection systems in only a percentage of their new cars. Opp. at 19 n.6. This argument is meritless, since Standard 208's options framework was in effect during the phase-in period and no court – including the court below – has ever held that the preemption analysis is any different with respect to cars manufactured during that time.

is both unnecessary and improper to even reach the question of implied preemption in the context of no-airbag claims. If Honda is right, and these decisions fundamentally misconstrue this Court's jurisprudence in *Cipollone* and *Myrick*, then surely the appropriate response is to grant review to resolve the conflict – not to sweep the split under the carpet.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

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Counsel for Petitioners

Date: July 16, 1999

Supreme Court, U.S.
FILED
OCT 22 1999
OFFICE OF THE CLERK

(19)

No. 98-1811

IN THE

Supreme Court of the United States

Alexis Geier, *et al.*,

Petitioners,

v.

American Honda Motor Company, Inc., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 5, 1999
WRIT OF CERTIORARI GRANTED SEPTEMBER 10, 1999

74PP

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ALEXIS GEIER and WILLIAM GEIER and CLAIRE GEIER, All at: 5109 Manning Pl., Washington, D.C. 20016	
Plaintiffs	
v.	Civil No. 95-CV- 0064 (WBB)
AMERICAN HONDA MOTOR CO. INC., Serve: CT Corp., Inc. 1025 Vermont Ave., NW Washington, DC 20005	
and	
HONDA OF AMERICA MANUFACTURING, INC. Serve: Statutory Agent Corp. 52 E. Gay St. Columbus, Ohio 43215	
and	
HONDA MOTOR COMPANY LTD., Serve President or his designated representative 2-1-1 Minami-Aoyama, Minato-Ku Tokyo, Japan 107	
Defendants.	

COMPLAINT

The plaintiff Alexis Geier, by and through counsel, sues the defendants American Honda Motor Co., Inc., Honda of America Manufacturing, Inc. and Honda Motor Co., Ltd. and for her cause of action states as follows:

1. The plaintiff, Alexis Geier, is a citizen of the District of Columbia.

2. Defendants American Honda Motor Co., Inc. and Honda of America Manufacturing, Inc. are corporations regularly doing business in the District of Columbia.

3. Defendant Honda Motor Co., Ltd. is a foreign corporation, headquartered in Tokyo, Japan, regularly doing business in the District of Columbia.

4. On or about January 12, 1992 at approximately 10:32 p.m., plaintiff Alexis Geier was the driver and occupant in the left, front driver's seat of a 1987 Honda Accord, four door sedan, serial number L6196563 which had been designed, manufactured and distributed by defendants American Honda Motor Co., Inc., Honda of America Manufacturing, Inc., and/or Honda Motor Co., Ltd., when the vehicle collided with a tree on the 4900 block of MacArthur Boulevard, near its intersection with Ashley Street, in the District of Columbia.

5. At the time of the accident, the vehicle in question was owned by Thomas J. Whitehead, a resident of the District of Columbia.

6. At the time of the accident, plaintiff Alexis Geier was a minor. She reached the age of majority on June 29, 1992.

7. At the time of the accident, plaintiff Alexis Geier was using the shoulder and lap belt that had been designed, assembled, tested and installed by defendants American Honda Motor Co., Inc., Honda of America Manufacturing, Inc. and/or Honda Motor Co., Ltd. for the driver's seating position of the 1987 Honda Accord.

8. The defendants American Honda Motor Co., Inc., Honda of America Manufacturing, Inc. and Honda Motor Co., Ltd. had a duty to design, manufacture, assemble, install and test a passenger seating and restraint system for the driver's seating position of the 1987 Honda Accord which was reasonably safe for use by its occupants, including plaintiff Alexis Geier.

9. Defendants American Honda Motor Co., Inc., Honda of America Manufacturing, Inc. and Honda Motor Co., Ltd. knew or should have known on the basis of the existing engineering, medical, safety and other scientific and technical literature through 1987 that a failure of the driver's seating and restraint systems could cause severe injuries in the event of an emergency.

10. Defendants American Honda Motor Co., Inc., Honda of America Manufacturing, Inc. and Honda Motor Co., Ltd. had a duty to design, manufacture, distribute and sell motor vehicles which contain driver's seating systems which provide suitable restraint and protection to an occupant at all times.

11. Defendants American Honda Motor Co., Inc., Honda of America Manufacturing, Inc. and Honda Motor Co., Ltd. had a duty to design, manufacture, distribute and sell a motor vehicle with an effective and safe passive restraint system, including, but not limited to, airbags and to keep abreast of and take into account the state of the art in the

science and engineering of safe passive restraint system, including, but not limited to, airbags.

12. Defendants American Honda Motor Co., Inc., Honda of America Manufacturing, Inc. and Honda Motor Co., Ltd. had a duty to design, manufacture, distribute and sell a motor vehicle which incorporated therein the state of the art for the automotive industry in the science and engineering of passive restraint systems, including, but not limited to, airbags.

13. Defendants American Honda Motor Co., Inc., Honda of America Manufacturing, Inc. and Honda Motor Co., Ltd. knew or should have known on the basis of the existing engineering, medical, safety and other scientific and technical literature through 1987 that the absence of a passive restraint system which includes airbags could cause severe injuries, in the event of a collision.

14. The driver's seating and restraint systems of the 1987 Honda Accord failed to provide suitable restraint at all times, including during the collision in which the vehicle was involved on January 12, 1992.

15. Upon the occurrence of that collision, the seat back of the left, driver's side seat broke.

16. Upon the occurrence of that collision, the left, driver's side seat broke off of its track.

17. Upon the occurrence of that collision, there was no airbag installed in the front, driver's side of the vehicle.

18. As a result, plaintiff Alexis Geier suffered serious and grievous injuries caused by the driver's seating and restraint systems failure to provide suitable restraint and protection to

plaintiff.

19. As a further result, plaintiff Alexis Geier suffered serious and grievous injuries caused by the absence of a passive restraint system that included airbags.

20. As a direct and proximate result of the aforesaid failure, plaintiff Alexis Geier suffered injury to all parts of her body, some of which are believed to be permanent, especially to her head, brain, mouth, legs, chest, neck, and back, suffered and shall suffer great pain of body and mind, incurred and shall incur medical and out of pocket expenses, suffered an interruption of her education, suffered a reduced earning capacity, was required to undergo multiple surgeries, suffered significant scarring and disfigurement, and suffered significant emotional and mental stress.

21. As a further direct and proximate result of the aforesaid failure, plaintiffs William Geier and Claire Geier, as parents of Alexis Geier incurred medical and out of pocket expenses on behalf of their daughter during her minority and lost time and income from work during their daughter's minority to care for and assist her.

COUNT I

(Negligence - American Honda Motor Co., Inc.)

Plaintiffs repeat and reallege each and every allegation in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety and as if fully set forth herein and incorporate them by reference and further state as follows:

22. Defendant American Honda Motor Co., Inc. owed a duty of care to plaintiff Alexis Geier.

23. Defendant American Honda Motor Co., Inc. breached its duty of care to plaintiff Alexis Geier in that it negligently designed, manufactured, assembled, tested, inspected, researched, installed, marketed and distributed the 1987 Honda Accord with inadequate passenger seating and restraint systems and negligently failed to warn the public, including plaintiff Alexis Geier, of the defective condition of the driver's seating and restraint systems.

24. As a direct and proximate result of defendant American Honda Motor Co., Inc.'s negligence, plaintiff Alexis Geier was damaged as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant American Honda Motor Co., Inc. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT II

(Negligence - Honda of America Manufacturing, Inc.)

Plaintiffs repeat and reallege each and every allegation in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety and as if fully set forth herein and incorporate them by reference and further state as follows:

25. Defendant Honda of America Manufacturing, Inc. owed a duty of care to plaintiff Alexis Geier.

26. Defendant Honda of America Manufacturing, Inc. breached its duty of care to plaintiff Alexis Geier in that it negligently designed, manufactured, assembled, tested, inspected, researched, installed, marketed and distributed the 1987 Honda Accord with inadequate passenger seating and

restraint systems and negligently failed to warn the public, including plaintiff Alexis Geier, of the defective condition of the driver's seating and restraint systems.

27. As a direct and proximate result of defendant Honda of America Manufacturing, Inc.'s negligence, plaintiff Alexis Geier was damaged as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant Honda of America Manufacturing, Inc. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT III

(Negligence - Honda Motor Co. Ltd.)

Plaintiffs repeat and reallege each and every allegation in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety and as if fully set forth herein and incorporate them by reference and further state as follows:

28. Defendant Honda Motor Co., Ltd. owed a duty of care to plaintiff Alexis Geier.

29. Defendant Honda Motor Co. Ltd. Inc. breached its duty of care to plaintiff Alexis Geier in that it negligently designed, manufactured, assembled, tested, inspected, researched, installed, marketed and distributed the 1987 Honda Accord with inadequate passenger seating and restraint systems and negligently failed to warn the public, including plaintiff Alexis Geier, of the defective condition of the driver's seating and restraint systems.

30. As a direct and proximate result of defendant

Honda Motor Co. Ltd.'s negligence, plaintiff Alexis Geier was damaged as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant Honda Motor Co. Ltd. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT IV

(Negligence - American Honda Motor Co., Inc.)

Plaintiffs repeat and reallege each and every allegation in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety and as if fully set forth herein and incorporate them by reference and further state as follows:

31. Defendant American Honda Motor Co., Inc. breached its duty of care to plaintiff Alexis Geier in that it negligently designed, manufactured, assembled, tested, inspected, researched, installed, marketed and distributed the 1987 Honda Accord with inadequate passenger seating and restraint systems and negligently failed to warn the public, including plaintiff Alexis Geier, of the defective condition of the driver's seating and restraint systems.

32. As a direct and proximate result of defendant American Honda Motor Co., Inc.'s negligence, plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant American Honda Motor Co., Inc. in the amount of $500,000 plus costs and interest.

COUNT V

(Negligence - Honda of America Manufacturing, Inc.)

Plaintiffs repeat and reallege each and every allegation in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety and as if fully set forth herein and incorporate them by reference and further state as follows:

33. Defendant Honda of America Manufacturing, Inc. breached its duty of care to plaintiff Alexis Geier in that it negligently designed, manufactured, assembled, tested, inspected, researched, installed, marketed and distributed the 1987 Honda Accord with inadequate passenger seating and restraint systems and negligently failed to warn the public, including plaintiff Alexis Geier, of the defective condition of the driver's seating and restraint systems.

34. As a direct and proximate result of defendant Honda of America Manufacturing, Inc.'s negligence, plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant Honda of America Manufacturing, Inc. in the amount of $500,000 plus costs and interest.

COUNT VI

(Negligence - Honda Motor Co. Ltd.)

Plaintiffs repeat and reallege each and every allegation in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety and as if fully set forth herein and incorporate them by reference and further state as follows:

35. Defendant Honda Motor Co. Ltd. Inc. breached its duty of care to plaintiff Alexis Geier in that it negligently designed, manufactured, assembled, tested, inspected, researched, installed, marketed and distributed the 1987 Honda Accord with inadequate passenger seating and restraint systems and negligently failed to warn the public, including plaintiff Alexis Geier of the defective condition of the driver's seating and restraint systems.

36. As a direct and proximate result of defendant Honda Motor Co. Ltd.'s negligence, plaintiffs William Geier and Claire were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant Honda Motor Co. Ltd. in the amount of $500,000.00 plus costs and interest.

COUNT VII

(Breach of Warranty - American Honda Motor Co., Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows:

37. Defendant American Honda Motor Co., Inc. designed, manufactured, assembled, inspected, tested and distributed the aforementioned vehicle, including its component parts, and warranted same to the public, including plaintiff Alexis Geier, that said vehicle, including the driver's seating and restraint systems, were of merchantable quality and were fit for the purposes for which they were intended, namely to reduce the risk of harm in the event of an impact or collision.

38. Plaintiff Alexis Geier relied upon the skill and judgment of Defendant American Honda Motor Co., Inc. in using the driver's seating and restraint systems of the 1987 Honda Accord and, at the time of the collision, was using the lap and shoulder belt installed on the vehicle in the foreseeable intended manner.

39. Defendant American Honda Motor Co., Inc. breached its warranty in that the seating systems of the 1987 Honda Accord were not safe for their intended use or of merchantable quality as warranted by defendant Honda Motor Co. Ltd. in that the seating and restraint systems failed to reduce the risk of harm in the event of impact or collision, and in fact, in the circumstances herein alleged, the driver's seat back broke and the driver's seat left its track, causing serious injuries to plaintiff Alexis Geier.

40. As a direct and proximate result of the aforesaid breach of express and implied warranties of defendant American Honda Motor Co., Inc., plaintiff Alexis Geier was damaged as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant American Honda Motor Co., Inc. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT VIII

(Breach of Warranty - Honda of America Manufacturing, Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and

incorporate them by reference and further state as follows:

41. Defendant Honda of America Manufacturing, Inc. designed, manufactured, assembled, inspected, tested and distributed the aforementioned vehicle, including its component parts, and warranted same to the public, including plaintiff Alexis Geier, that said vehicle, including the driver's seating and restraint systems, were of merchantable quality and were fit for the purposes for which they were intended, namely to reduce the risk of harm in the event of an impact or collision.

42. Plaintiff Alexis Geier relied upon the skill and judgment of defendant Honda of America Manufacturing, Inc. in using the driver's seating and restraint systems of the 1987 Honda Accord and, at the time of the collision, was using the lap and shoulder belt installed on the vehicle in the foreseeable intended manner.

43. Defendant Honda of America Manufacturing, Inc. breached its warranty in that the seating systems of the 1987 Honda Accord were not safe for their intended use or of merchantable quality as warranted by defendant Honda Motor Co. Ltd. in that the seating and restraint systems failed to reduce the risk of harm in the event of impact or collision, and in fact, in the circumstances herein alleged, the driver's seat back broke and the driver's seat left its track, causing serious injuries to plaintiff Alexis Geier.

44. As a direct and proximate result of the aforesaid breach of express and implied warranties of defendant Honda of America Manufacturing, Inc., plaintiff Alexis Geier was damaged as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant Honda of

America Manufacturing, Inc. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT IX

(Breach of Warranty-Honda Motor Co. Ltd.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows:

45. Defendant Honda Motor Co. Ltd. designed, manufactured, assembled, inspected, tested and distributed the aforementioned vehicle, including its component parts, and warranted same to the public, including plaintiff Alexis Geier, that said vehicle, including the driver's seating and restraint systems, were of merchantable quality and were fit for the purposes for which they were intended, namely to reduce the risk of harm in the event of an impact or collision.

46. Plaintiff Alexis Geier relied upon the skill and judgment of Defendant Honda Motor Co. Ltd. in using the driver's seating and restraint systems of the 1987 Honda Accord and, at the time of the collision, was using the lap and shoulder belt installed on the vehicle in the foreseeable intended manner.

47. Defendant Honda Motor Co. Ltd. breached its warranty in that the seating systems of the 1987 Honda Accord were not safe for their intended use or of merchantable quality as warranted by defendant Honda Motor Co. Ltd. in that the seating and restraint systems failed to reduce the risk of harm in the event of impact or collision, and in fact, in the circumstances herein alleged, the driver's seat back broke and the driver's seat left its track, causing serious injuries to plaintiff

Alexis Geier.

48. As a direct and proximate result of the aforesaid breach of express and implied warranties of defendant Honda Motor Co. Ltd., plaintiff Alexis Geier was damaged as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant Honda Motor Co. Ltd. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT X

(Breach of Warranty - American Honda Motor Co., Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows:

49. Defendant American Honda Motor Co., Inc. designed, manufactured, assembled, inspected, tested and distributed the aforementioned vehicle, including its component parts, and warranted same to the public, including plaintiff Alexis Geier, that said vehicle, including the driver's seating and restraint systems, were of merchantable quality and were fit for the purposes for which they were intended, namely to reduce the risk of harm in the event of an impact or collision.

50. Plaintiff Alexis Geier relied upon the skill and judgment of Defendant American Honda Motor Co., Inc. in using the driver's seating and restraint systems of the 1987 Honda Accord and, at the time of the collision, was using the lap and shoulder belt installed on the vehicle in the foreseeable

intended manner.

51. Defendant American Honda Motor Co., Inc. breached its warranty in that the seating systems of the 1987 Honda Accord were not safe for their intended use or of merchantable quality as warranted by defendant American Honda Motor Co., Inc. in that the seating and restraint systems failed to reduce the risk of harm in the event of impact or collision, and in fact, in the circumstances herein alleged, the driver's seat back broke and the driver's seat left its track, causing serious injuries to plaintiff Alexis Geier.

52. As a direct and proximate result of the aforesaid breach of express and implied warranties of defendant American Honda Motor Co., Inc., plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant American Honda Motor Co., Inc. in the amount of $500,000.00 plus costs and interest.

COUNT XI

(Breach of Warranty - Honda of America Manufacturing, Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows:

53. Defendant Honda of America Manufacturing, Inc. designed, manufactured, assembled, inspected, tested and distributed the aforementioned vehicle, including its component parts, and warranted same to the public, including plaintiff

Alexis Geier, that said vehicle, including the driver's seating and restraint systems, were of merchantable quality and were fit for the purposes for which they were intended, namely to reduce the risk of harm in the event of an impact or collision.

54. Plaintiff Alexis Geier relied upon the skill and judgment of Defendant Honda of America Manufacturing, Inc. in using the driver's seating and restraint systems of the 1987 Honda Accord and, at the time of the collision, was using the lap and shoulder belt installed on the vehicle in the foreseeable intended manner.

55. Defendant Honda of America Manufacturing, Inc. breached its warranty in that the seating systems of the 1987 Honda Accord were not safe for their intended use or of merchantable quality as warranted by defendant Honda of America Manufacturing, Inc. in that the seating and restraint systems failed to reduce the risk of harm in the event of impact or collision, and in fact, in the circumstances herein alleged, the driver's seat back broke and the driver's seat left its track, causing serious injuries to plaintiff Alexis Geier.

56. As a direct and proximate result of the aforesaid breach of express and implied warranties of defendant Honda of America Manufacturing, Inc., plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant Honda of America Manufacturing, Inc. in the amount of $500,000.00 plus costs and interest.

COUNT XII
(Breach of Warranty-Honda Motor Co. Ltd.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows:

57. Defendant Honda Motor Co. Ltd. designed, manufactured, assembled, inspected, tested and distributed the aforementioned vehicle, including its component parts, and warranted same to the public, including plaintiff Alexis Geier, that said vehicle, including the driver's seating and restraint systems, were of merchantable quality and were fit for the purposes for which they were intended, namely to reduce the risk of harm in the event of an impact or collision.

58. Plaintiff Alexis Geier relied upon the skill and judgment of Defendant Honda Motor Co. Ltd. in using the driver's seating and restraint systems of the 1987 Honda Accord and, at the time of the collision, was using the lap and shoulder belt installed on the vehicle in the foreseeable intended manner.

59. Defendant Honda Motor Co. Ltd. breached its warranty in that the seating systems of the 1987 Honda Accord were not safe for their intended use or of merchantable quality as warranted by defendant Honda Motor Co. Ltd. in that the seating and restraint systems failed to reduce the risk of harm in the event of impact or collision, and in fact, in the circumstances herein alleged, the driver's seat back broke and the driver's seat left its track, causing serious injuries to plaintiff Alexis Geier.

60. As a direct and proximate result of the aforesaid breach of express and implied warranties of defendant Honda

Motor Co. Ltd., plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant American Honda Motor Co., Inc. in the amount of $500,000.00 plus costs and interest.

COUNT XIII

(Strict Liability-American Honda Motor Co., Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows;

61. Defendant American Honda Motor Co., Inc. designed, manufactured, assembled, tested, assembled and marketed a vehicle which contained component parts, namely, the driver's seat, which was defective and inherently dangerous to the user, including plaintiff Alexis Geier, in that said systems could and did cause serious injuries to their user when the vehicle was involved in an impact or collision.

62. Defendant American Honda Motor Co., Inc. failed to warn the public, including Alexis Geier, of the defective and inherently dangerous condition of the driver's seat.

63. As a direct result of the aforesaid unreasonable and inherently dangerous condition of said vehicle manufactured by defendant American Honda Motor Co., Inc., plaintiff Alexis Geier suffered damages as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant American Honda Motor Co., Inc. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT XIV

(Strict Liability-Honda of America Manufacturing, Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows;

64. Defendant Honda of America Manufacturing, Inc. designed, manufactured, assembled, tested, assembled and marketed a vehicle which contained component parts, namely, the driver's seat, which was defective and inherently dangerous to the user, including plaintiff Alexis Geier, in that said systems could and did cause serious injuries to their user when the vehicle was involved in an impact or collision.

65. Defendant Honda of America Manufacturing, Inc. failed to warn the public, including Alexis Geier, of the defective and inherently dangerous condition of the driver's seat.

66. As a direct result of the aforesaid unreasonable and inherently dangerous condition of said vehicle manufactured by defendant Honda of America Manufacturing, Inc., plaintiff Alexis Geier suffered damages as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant American Honda Motor Co., Inc. in the amount of $10,000,000.00 as

compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT XV
(Strict Liability-Honda Motor Co., Ltd.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows;

67. Defendant Honda Motor Co., Ltd. designed, manufactured, assembled, tested, assembled and marketed a vehicle which contained component parts, namely, the driver's seat, which was defective and inherently dangerous to the user, including plaintiff Alexis Geier in that said systems could and did cause serious injuries to their user when the vehicle was involved in an impact or collision.

68. Defendant Honda Motor Co., Ltd. failed to warn the public, including Alexis Geier, of the defective and inherently dangerous condition of the driver's seat.

69. As a direct result of the aforesaid unreasonable and inherently dangerous condition of said vehicle manufactured by defendant Honda Motor Co., Ltd., plaintiff Alexis Geier suffered damages as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant Honda Motor Co., Ltd. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT XVI
(Strict Liability-American Honda Motor Co., Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows;

70. Defendant American Honda Motor Co., Inc. designed, manufactured, assembled, tested, assembled and marketed a vehicle which contained component parts, namely, the driver's seat, which was defective and inherently dangerous to the user, including plaintiff Alexis Geier, in that said systems could and did cause serious injuries to their user when the vehicle was involved in an impact or collision.

71. Defendant American Honda Motor Co., Inc. failed to warn the public, including Alexis Geier, of the defective and inherently dangerous condition of the driver's seat.

72. As a direct result of the aforesaid unreasonable and inherently dangerous condition of said vehicle manufactured by defendant American Honda Motor Co., Inc., plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant American Honda Motor Co., Inc. in the amount of $500,000.00 plus costs and interest.

COUNT XVII
(Strict Liability-Honda of America Manufacturing, Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows;

73. Defendant Honda of America Manufacturing, Inc. designed, manufactured, assembled, tested, assembled and marketed a vehicle which contained component parts, namely, the driver's seat, which was defective and inherently dangerous to the user, including plaintiff Alexis Geier, in that said systems could and did cause serious injuries to their user when the vehicle was involved in an impact or collision.

74. Defendant Honda of America Manufacturing, Inc. failed to warn the public, including Alexis Geier, of the defective and inherently dangerous condition of the driver's seat.

75. As a direct result of the aforesaid unreasonable and inherently dangerous condition of said vehicle manufactured by defendant Honda of America Manufacturing, Inc., plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant Honda of America Manufacturing, Inc. in the amount of $500,000.00 plus costs and interest.

COUNT XVIII
(Strict Liability-Honda Motor Co., Ltd.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows;

76. Defendant Honda Motor Co., Ltd. designed, manufactured, assembled, tested, assembled and marketed a vehicle which contained component parts, namely, the driver's seat, which was defective and inherently dangerous to the user, including plaintiff Alexis Geier in that said systems could and did cause serious injuries to their user when the vehicle was involved in an impact or collision.

77. Defendant Honda Motor Co., Ltd. failed to warn the public, including Alexis Geier, of the defective and inherently dangerous condition of the driver's seat.

78. As a direct result of the aforesaid unreasonable and inherently dangerous condition of said vehicle manufactured by defendant Honda Motor Co., Ltd., plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant Honda Motor Co., Ltd. in the amount of $500,000.00 plus costs and interest.

COUNT XIX
(Negligence - American Honda Motor Co., Inc.)

Plaintiffs repeat and reallege each and every allegation in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety and as if fully set forth herein and incorporate them by reference and further state as follows:

79. Defendant American Honda Motor Co., Inc. breached its duty of care to plaintiff Alexis Geier in that it negligently designed, manufactured, assembled, tested, inspected, researched, installed, marketed and distributed the 1987 Honda Accord without adequate safety devices, including, but not limited to airbags and negligently failed to warn the public, including plaintiff Alexis Geier, of the absence of such safety devices.

80. As a direct and proximate result of defendant American Honda Motor Co., Inc.'s negligence, plaintiff Alexis Geier was damaged as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant American Honda Motor Co., Inc. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT XX
(Negligence - Honda of America Manufacturing, Inc.)

Plaintiffs repeat and reallege each and every allegation in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety and as if fully set forth herein and incorporate them by reference and further state as follows:

81. Defendant Honda of America Manufacturing, Inc. breached its duty of care to plaintiff Alexis Geier in that it negligently designed, manufactured, assembled, tested, inspected, researched, installed, marketed and distributed the 1987 Honda Accord without adequate safety devices, including, but not limited to airbags and negligently failed to warn the public, including plaintiff Alexis Geier, of the absence of such safety devices.

82. As a direct and proximate result of defendant Honda of America Manufacturing, Inc.'s negligence, plaintiff Alexis Geier was damaged as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant Honda of America Manufacturing, Inc. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT XXI
(Negligence - Honda Motor Co. Ltd.)

Plaintiffs repeat and reallege each and every allegation in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety and as if fully set forth herein and incorporate them by reference and further state as follows:

83. Defendant Honda Motor Co. Ltd. breached its duty of care to plaintiff Alexis Geier in that it negligently designed, manufactured, assembled, tested, inspected, researched, installed, marketed and distributed the 1987 Honda Accord without adequate safety devices, including, but not limited to airbags and negligently failed to warn the public, including plaintiff Alexis Geier, of the absence of such safety devices.

84. As a direct and proximate result of defendant Honda Motor Co. Ltd.'s negligence, plaintiff Alexis Geier was damaged as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant Honda Motor Co. Ltd. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT XXII

(Negligence - American Honda Motor Co., Inc.)

Plaintiffs repeat and reallege each and every allegation in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety and as if fully set forth herein and incorporate them by reference and further state as follows:

85. Defendant American Honda Motor Co., Inc. breached its duty of care to plaintiff Alexis Geier in that it negligently designed, manufactured, assembled, tested, inspected, researched, installed, marketed and distributed the 1987 Honda Accord without adequate safety devices, including, but not limited to airbags and negligently failed to warn the public, including plaintiff Alexis Geier, of the absence of such safety devices.

86. As a direct and proximate result of defendant American Honda Motor Co., Inc.'s negligence, plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant American Honda Motor Co., Inc. in the amount of

$500,000.00 plus costs and interest.

COUNT XXIII

(Negligence - Honda of America Manufacturing, Inc.)

Plaintiffs repeat and reallege each and every allegation in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety and as if fully set forth herein and incorporate them by reference and further state as follows:

87. Defendant Honda of America Manufacturing, Inc. breached its duty of care to plaintiff Alexis Geier in that it negligently designed, manufactured, assembled, tested, inspected, researched, installed, marketed and distributed the 1987 Honda Accord without adequate safety devices, including, but not limited to airbags and negligently failed to warn the public, including plaintiff Alexis Geier, of the absence of such safety devices.

88. As a direct and proximate result of defendant Honda of America Manufacturing, Inc.'s negligence, plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant Honda of America Manufacturing, Inc. in the amount of $500,000.00 plus costs and interest.

COUNT XXIV
(Negligence - Honda Motor Co. Ltd.)

Plaintiffs repeat and reallege each and every allegation in the foregoing Introductory Paragraphs 1 through 21 of this Complaint in their entirety and as if fully set forth herein and incorporate them by reference and further state as follows:

89. Defendant Honda Motor Co. Ltd. breached its duty of care to plaintiff Alexis Geier in that it negligently designed, manufactured, assembled, tested, inspected, researched, installed, marketed and distributed the 1987 Honda Accord without adequate safety devices, including, but not limited to airbags and negligently failed to warn the public, including plaintiff Alexis Geier, of the absence of such safety devices.

90. As a direct and proximate result of defendant Honda Motor Co. Ltd.'s negligence, plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant American Honda Motor Co., Inc. in the amount of $500,000.00 plus costs and interest.

COUNT XXV
(Breach of Warranty - American Honda Motor Co., Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows:

91. Defendant American Honda Motor Co., Inc. designed, manufactured, assembled, inspected, tested and

distributed the aforementioned vehicle, including its component parts, and warranted same to the public, including plaintiff Alexis Geier, that said vehicle was of merchantable quality and was fit for the purposes for which they were intended, namely to reduce the risk of harm in the event of an impact or collision.

92. Plaintiff Alexis Geier relied upon the skill and judgment of Defendant American Honda Motor Co., Inc. in using the driver's seating and restraint systems of the 1987 Honda Accord and, at the time of the collision, was using the lap and shoulder belt installed on the vehicle in the foreseeable intended manner.

93. Defendant American Honda Motor Co., Inc. breached its warranty in that the 1987 Honda Accord was not safe for their intended use or of merchantable quality as warranted by defendant Honda Motor Co. Ltd. in that it did not contain a passive restraint system, including, but not limited to airbags, which would reduce the risk of harm in the event of impact or collision, and in fact, in the circumstances herein alleged, did cause serious injuries to plaintiff Alexis Geier.

94. As a direct and proximate result of the aforesaid breach of express and implied warranties of defendant American Honda Motor Co., Inc., plaintiff Alexis Geier was damaged as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant American Honda Motor Co., Inc. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT XXVI
(Breach of Warranty - Honda of America Manufacturing, Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows:

95. Defendant Honda of America Manufacturing, Inc. designed, manufactured, assembled, inspected, tested and distributed the aforementioned vehicle, including its component parts, and warranted same to the public, including plaintiff Alexis Geier, that said vehicle was of merchantable quality and was fit for the purposes for which they were intended, namely to reduce the risk of harm in the event of an impact or collision.

96. Plaintiff Alexis Geier relied upon the skill and judgment of Defendant Honda of America Manufacturing, Inc. in using the driver's seating and restraint systems of the 1987 Honda Accord and, at the time of the collision, was using the lap and shoulder belt installed on the vehicle in the foreseeable intended manner.

97. Defendant Honda of America Manufacturing, Inc. breached its warranty in that the 1987 Honda Accord was not safe for their intended use or of merchantable quality as warranted by defendant Honda of America Manufacturing, Inc. in that it did not contain a passive restraint system, including, but not limited to airbags, which would reduce the risk of harm in the event of impact or collision, and in fact, in the circumstances herein alleged, did cause serious injuries to plaintiff Alexis Geier.

98. As a direct and proximate result of the aforesaid

breach of express and implied warranties of defendant Honda of America Manufacturing, Inc., plaintiff Alexis Geier was damaged as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant Honda of America Manufacturing, Inc. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT XXVII
(Breach of Warranty-Honda Motor Co. Ltd.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows:

99. Defendant Honda Motor Co. Ltd. designed, manufactured, assembled, inspected, tested and distributed the aforementioned vehicle, including its component parts, and warranted same to the public, including plaintiff Alexis Geier, that said vehicle was of merchantable quality and was fit for the purposes for which they were intended, namely to reduce the risk of harm in the event of an impact or collision.

100. Plaintiff Alexis Geier relied upon the skill and judgment of Defendant Honda Motor Co. Ltd. in using the 1987 Honda Accord and, at the time of the collision, was using the lap and shoulder belt installed on the vehicle in the foreseeable intended manner.

101. Defendant Honda Motor Co. Ltd. breached its warranty in that the 1987 Honda Accord was not safe for its intended use or of merchantable quality as warranted by

defendant Honda Motor Co. Ltd. in that it did not contain a passive restraint system, including, but not limited to airbags, which would reduce the risk of harm in the event of impact or collision, and in fact, in the circumstances herein alleged, did cause serious injuries to plaintiff Alexis Geier.

102. As a direct and proximate result of the aforesaid breach of express and implied warranties of defendant Honda Motor Co. Ltd., plaintiff Alexis Geier was damaged as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant Honda Motor Co. Ltd. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT XXVIII

(Breach of Warranty - American Honda Motor Co., Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows:

103. Defendant American Honda Motor Co., Inc. designed, manufactured, assembled, inspected, tested and distributed the aforementioned vehicle, including its component parts, and warranted same to the public, including plaintiff Alexis Geier, that said vehicle was of merchantable quality and was fit for the purposes for which they were intended, namely to reduce the risk of harm in the event of an impact or collision.

104. Plaintiff Alexis Geier relied upon the skill and judgment of Defendant American Honda Motor Co., Inc. in

using the driver's seating and restraint systems of the 1987 Honda Accord and, at the time of the collision, was using the lap and shoulder belt installed on the vehicle in the foreseeable intended manner.

105. Defendant American Honda Motor Co., Inc. breached its warranty in that the 1987 Honda Accord was not safe for their intended use or of merchantable quality as warranted by defendant Honda Motor Co. Ltd. in that it did not contain a passive restraint system, including, but not limited to airbags, which would reduce the risk of harm in the event of impact or collision, and in fact, in the circumstances herein alleged, did cause serious injuries to plaintiff Alexis Geier.

106. As a direct and proximate result of the aforesaid breach of express and implied warranties of defendant American Honda Motor Co., Inc., plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant American Honda Motor Co., Inc. in the amount of $500,000.00 plus costs and interest.

COUNT XXIX

(Breach of Warranty - Honda of America Manufacturing, Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows:

107. Defendant Honda of America Manufacturing, Inc. designed, manufactured, assembled, inspected, tested and

distributed the aforementioned vehicle, including its component parts, and warranted same to the public, including plaintiff Alexis Geier, that said vehicle was of merchantable quality and was fit for the purposes for which they were intended, namely to reduce the risk of harm in the event of an impact or collision.

108. Plaintiff Alexis Geier relied upon the skill and judgment of Defendant Honda of America Manufacturing, Inc. in using the driver's seating and restraint systems of the 1987 Honda Accord and, at the time of the collision, was using the lap and shoulder belt installed on the vehicle in the foreseeable intended manner.

109. Defendant Honda of America Manufacturing, Inc. breached its warranty in that the 1987 Honda Accord was not safe for their intended use or of merchantable quality as warranted by defendant Honda of America Manufacturing, Inc. in that it did not contain a passive restraint system, including, but not limited to airbags, which would reduce the risk of harm in the event of impact or collision, and in fact, in the circumstances herein alleged, did cause serious injuries to plaintiff Alexis Geier.

110. As a direct and proximate result of the aforesaid breach of express and implied warranties of defendant Honda of America Manufacturing, Inc., plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant Honda of America Manufacturing, Inc. in the amount of $500,000.00 plus costs and interest.

COUNT XXX

(Breach of Warranty-Honda Motor Co. Ltd.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows:

111. Defendant Honda Motor Co. Ltd. designed, manufactured, assembled, inspected, tested and distributed the aforementioned vehicle, including its component parts, and warranted same to the public, including plaintiff Alexis Geier, that said vehicle was of merchantable quality and was fit for the purposes for which they were intended, namely to reduce the risk of harm in the event of an impact or collision.

112. Plaintiff Alexis Geier relied upon the skill and judgment of Defendant Honda Motor Co. Ltd. in using the 1987 Honda Accord and, at the time of the collision, was using the lap and shoulder belt installed on the vehicle in the foreseeable intended manner.

113. Defendant Honda Motor Co. Ltd. breached its warranty in that the 1987 Honda Accord was not safe for its intended use or of merchantable quality as warranted by defendant Honda Motor Co. Ltd. in that it did not contain a passive restraint system, including, but not limited to airbags, which would reduce the risk of harm in the event of impact or collision, and in fact, in the circumstances herein alleged, did cause serious injuries to plaintiff Alexis Geier.

114. As a direct and proximate result of the aforesaid breach of express and implied warranties of defendant Honda Motor Co. Ltd., plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant American Honda Motor Co., Inc. in the amount of $500,000.00 plus costs and interest.

COUNT XXXI
(Strict Liability-American Honda Motor Co., Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows;

115. Defendant American Honda Motor Co., Inc. designed, manufactured, assembled, tested, assembled and marketed a vehicle without incorporating therein the state of the art of the automotive industry in the science and engineering of passive restraint systems, including but not limited to airbags; deliberately and intentionally excluded certain passive restraint systems even though these systems were necessary for the manufacture of a safe vehicle; failed to recall the plaintiff's vehicle and retrofit the vehicle with necessary restraint systems.

116. Defendant American Honda Motor Co., Inc. failed to warn the public, including Alexis Geier, of the defective and inherently dangerous condition of the vehicle.

117. As a direct result of the aforesaid unreasonable and inherently dangerous condition of said vehicle manufactured by defendant American Honda Motor Co., Inc., plaintiff Alexis Geier suffered damages as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant American

Honda Motor Co., Inc. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT XXXII
(Strict Liability-Honda of America Manufacturing, Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows;

118. Defendant Honda of America Manufacturing, Inc. designed, manufactured, assembled, tested, assembled and marketed a vehicle without incorporating therein the state of the art of the automotive industry in the science and engineering of passive restraint systems, including but not limited to airbags; deliberately and intentionally excluded certain passive restraint systems even though these systems were necessary for the manufacture of a safe vehicle; failed to recall the plaintiff's vehicle and retrofit the vehicle with necessary restraint systems.

119. Defendant Honda of America Manufacturing, Inc. failed to warn the public, including Alexis Geier, of the defective and inherently dangerous condition of the vehicle.

120. As a direct result of the aforesaid unreasonable and inherently dangerous condition of said vehicle manufactured by defendant Honda of America Manufacturing, Inc., plaintiff Alexis Geier suffered damages as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant Honda of America Manufacturing, Inc. in the amount of $10,000,000.00

as compensatory damages plus cost and interest, and in the amount of $10,000,000.00 as punitive damages.

COUNT XXXIII
(Strict Liability-Honda Motor Co., Ltd.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows;

121. Defendant Honda Motor Co., Ltd. designed, manufactured, assembled, tested, assembled and marketed a vehicle without incorporating therein the state of the art of the automotive industry in the science and engineering of passive restraint systems, including but not limited to airbags; deliberately and intentionally excluded certain passive restraint systems even though these systems were necessary for the manufacture of a safe vehicle; failed to recall the plaintiff's vehicle and retrofit the vehicle with necessary restraint systems

122. Defendant Honda Motor Co., Ltd. failed to warn the public, including Alexis Geier, of the defective and inherently dangerous condition of the rear passenger restraint system.

123. As a direct result of the aforesaid unreasonable and inherently dangerous condition of said vehicle manufactured by defendant Honda Motor Co., Ltd., plaintiff Alexis Geier suffered damages as set forth in paragraph 20.

WHEREFORE, the premises considered, plaintiff Alexis Geier demands judgment against defendant Honda Motor Co., Ltd. in the amount of $10,000,000.00 as compensatory damages plus cost and interest, and in the

amount of $10,000,000.00 as punitive damages.

COUNT XXXIV
(Strict Liability-American Honda Motor Co., Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows;

124. Defendant American Honda Motor Co., Inc. designed, manufactured, assembled, tested, assembled and marketed a vehicle without incorporating therein the state of the art of the automotive industry in the science and engineering of passive restraint systems, including but not limited to airbags; deliberately and intentionally excluded certain passive restraint systems even though these systems were necessary for the manufacture of a safe vehicle; failed to recall the plaintiff's vehicle and retrofit the vehicle with necessary restraint systems.

125. Defendant American Honda Motor Co., Inc. failed to warn the public, including Alexis Geier, of the defective and inherently dangerous condition of the vehicle.

126. As a direct result of the aforesaid unreasonable and inherently dangerous condition of said vehicle manufactured by defendant American Honda Motor Co., Inc., plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant American Honda Motor Co., Inc. in the amount of $500,000.00 plus costs and interest.

COUNT XXXV
(Strict Liability-Honda of America Manufacturing, Inc.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows;

127. Defendant Honda of America Manufacturing, Inc. designed, manufactured, assembled, tested, assembled and marketed a vehicle without incorporating therein the state of the art of the automotive industry in the science and engineering of passive restraint systems, including but not limited to airbags; deliberately and intentionally excluded certain passive restraint systems even though these systems were necessary for the manufacture of a safe vehicle; failed to recall the plaintiff's vehicle and retrofit the vehicle with necessary restraint systems.

128. Defendant Honda of America Manufacturing, Inc. failed to warn the public, including Alexis Geier, of the defective and inherently dangerous condition of the vehicle.

129. As a direct result of the aforesaid unreasonable and inherently dangerous condition of said vehicle manufactured by defendant Honda of America Manufacturing, Inc., plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against defendant Honda of America Manufacturing, Inc., in the amount of $500,000.00 plus costs and interest.

COUNT XXXVI
(Strict Liability-Honda Motor Co., Ltd.)

Plaintiffs repeat and reallege each and every allegation contained in the foregoing paragraphs 1 through 21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference and further state as follows;

130. Defendant Honda Motor Co., Ltd. designed, manufactured, assembled, tested, assembled and marketed a vehicle without incorporating therein the state of the art of the automotive industry in the science and engineering of passive restraint systems, including but not limited to airbags; deliberately and intentionally excluded certain passive restraint systems even though these systems were necessary for the manufacture of a safe vehicle; failed to recall the plaintiff's vehicle and retrofit the vehicle with necessary restraint systems

131. Defendant Honda Motor Co., Ltd. failed to warn the public, including Alexis Geier, of the defective and inherently dangerous condition of the rear passenger restraint system.

132. As a direct result of the aforesaid unreasonable and inherently dangerous condition of said vehicle manufactured by defendant Honda Motor Co., Ltd., plaintiffs William Geier and Claire Geier were damaged as set forth in paragraph 21.

WHEREFORE, the premises considered, plaintiffs William Geier and Claire Geier demand judgment against

defendant American Honda Motor Co., Inc. in the amount of $500,000.00 plus costs and interest.

CADEAUX & TAGLIERI, P.C.

/s/ James W. Taglieri
James W. Taglieri #229880
Attorney for Plaintiff
1100 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
Telephone (202) 785-3373

JURY DEMAND

Plaintiff herein demands a trial by a jury as to all issues involved herein.

/s/ James W. Taglieri
James W. Taglieri
Attorney for Plaintiff

JWT/fan

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALEXIS GEIER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 1:95CV00064
	)	
AMERICAN HONDA MOTOR CO., INC., et al.,	)	
	)	
Defendants.	)	

ANSWER

Defendant American Honda Motor Co., Inc. ("American Honda"), by counsel, hereby answers the Complaint as follows:

In answer to the numbered paragraphs of the Complaint, American Honda states as follows:

1. American Honda is without sufficient information or knowledge to admit or deny the allegations in paragraph 1 and, therefore, denies those allegations and demands strict proof thereof.

2. The allegations in paragraph 2 are legal conclusions and no response is required. To the extent a response is required, American Honda denies those allegations and demands strict proof thereof.

3. American Honda admits that Honda Motor Co., Ltd. is a foreign corporation headquartered in Tokyo, Japan. The remaining allegations in paragraph 3 are legal conclusions

and no response is required. To the extent a response is required, American Honda denies the allegations in paragraph 3 and demands strict proof thereof.

4. American Honda is without sufficient information or knowledge to admit or deny the allegations in paragraph 4, and, therefore, denies those allegations and demands strict proof thereof.

5. American Honda is without sufficient information or knowledge to admit or deny the allegations in paragraph 5, and, therefore, denies those allegations and demands strict proof thereof.

6. American Honda is without sufficient information or knowledge to admit or deny the allegations in paragraph 6, and, therefore, denies those allegations and demands strict proof thereof.

7. American Honda is without sufficient information or knowledge to admit or deny the allegations in paragraph 7, and, therefore, denies those allegations and demands strict proof thereof.

8. The allegations in paragraph 8 are legal conclusions and no response is required. To the extent a response is required, American Honda specifically denies that it designs, manufactures, assembles, installs, or tests passenger seating and restraint systems in 1987 Honda Accords. American Honda admits only those duties that arise as a matter of express agreement or as a matter of law. American Honda states that the passenger seating and restraint system for the driver's seating position of the 1987 Honda Accord was reasonably safe for use by its occupants, including plaintiff Alexis Geier. American Honda denies the remaining

allegations in paragraph 8 and demands strict proof thereof.

9. The allegations in paragraph 9 are vague and ambiguous because the terms "failure" and "emergency" are not defined and American Honda is therefore unable to respond to those allegations. In addition, to the extent those allegations are legal conclusions, no response is require[illegible] To the extent a response is required, American Honda denies those allegations and demands strict proof thereof.

10. The allegations in paragraph 10 are legal conclusions and no response is required. To the extent a response is required, American Honda specifically denies that it designs or manufactures motor vehicles. American Honda admits only those duties that arise as a matter of express agreement or as a matter of law. American Honda denies the remaining allegations in paragraph 10 and demands strict proof thereof.

11. The allegations in paragraph 11 are legal conclusions and no response is required. To the extent a response is required, American Honda specifically denies that it designs or manufactures motor vehicles. American Honda admits only those duties that arise as a matter of express agreement or as a matter of law. American Honda denies the remaining allegations in paragraph 11 and demands strict proof thereof.

12. The allegations in paragraph 12 are legal conclusions and no response is required. To the extent a response is required, American Honda specifically denies that it designs or manufactures motor vehicles. American Honda admits only those duties that arise as a matter of express agreement or as a matter of law. American Honda denies the remaining allegations in paragraph 12 and demands strict proof

thereof.

13. The allegations in paragraph 13 are vague and ambiguous because the term "collision" is not defined and American Honda is therefore unable to respond to those allegations. To the extent the allegations in paragraph 13 are legal conclusions, no response is required. To the extent a response is required, American Honda denies the allegations in paragraph 13 and demands strict proof thereof.

14. American Honda denies the allegations in paragraph 14 and demands strict proof thereof.

15. American Honda is without sufficient information or knowledge to admit or deny the allegations in paragraph 15 and, therefore, denies those allegations and demands strict proof thereof.

16. American Honda is without sufficient information or knowledge to admit or deny the allegations in paragraph 16 and, therefore, denies those allegations and demands strict proof thereof.

17. American Honda is without sufficient information or knowledge to admit or deny the allegations in paragraph 17 and, therefore, denies those allegations and demands strict proof thereof.

18. American Honda denies the allegations in paragraph 18 and demands strict proof thereof.

19. American Honda denies the allegations in paragraph 19 and demands strict proof thereof.

20. American Honda denies the allegations in

paragraph 20 and demands strict proof thereof.

21. American Honda denies the allegations in paragraph 21 and demands strict proof thereof.

COUNT I

(Negligence - American Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-21 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

22. The allegations in paragraph 22 are legal conclusions and no response is required. To the extent a response is required, American Honda admits only those duties that arise as a matter of express agreement or as a matter of law. American Honda denies the remaining allegations in paragraph 22 and demands strict proof thereof.

23. American Honda denies the allegations in paragraph 23 and demands strict proof thereof.

24. American Honda denies the allegations in paragraph 24 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count I of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT II

(Negligence - Honda of America Manufacturing, Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-24 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count II are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 25-27 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count II of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT III

(Negligence - Honda Motor Co., Ltd.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-27 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count III are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 28-30 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count III of the Complaint be dismissed with prejudice,

that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT IV

(Negligence - American Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-30 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

31. American Honda denies the allegations in paragraph 31 and demands strict proof thereof.

32. American Honda denies the allegations in paragraph 32 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count IV of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT V

(Negligence - Honda of America Manufacturing, Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-32 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count V are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 33-34 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count V of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT VI

(Negligence - Honda Motor Co., Ltd.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-34 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count VI are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 35-36 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count VI of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT VII

(Breach of Warranty - American Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-36 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

37. American Honda denies that it designed, manufactured, assembled, inspected or tested the 1987 Honda Accord identified in paragraph 4 of plaintiffs' Complaint.

American Honda admits that it distributed the vehicle. American Honda admits only its express warranties and those warranties that arise as a matter of law. American Honda denies the remaining allegations in paragraph 37 and demands strict proof thereof.

38. American Honda is without sufficient information or knowledge to admit or deny the allegations in paragraph 38 and, therefore, denies those allegations and demands strict proof thereof.

39. American Honda denies the allegations in paragraph 39 and demands strict proof thereof.

40. American Honda denies the allegations in paragraph 40 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count VII of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT VIII

(Breach of Warranty - Honda of America Manufacturing, Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-40 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count VIII are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 41-44 and demands strict proof

thereof.

WHEREFORE, American Honda respectfully requests that Count VIII of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT IX

(Breach of Warranty - Honda Motor Co., Ltd.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-44 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count IX are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 45-48 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count IX of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT X

(Breach of Warranty - American Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-48 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

49. American Honda denies that it designed, manufactured, assembled, inspected, or tested the vehicle identified in paragraph 4 of plaintiffs' Complaint. American Honda admits that it distributed the vehicle. American Honda admits only its express warranties and warranties that arise as a matter of law. American Honda denies the remaining allegations in paragraph 49 and demands strict proof thereof.

50. American Honda is without sufficient information or knowledge to admit or deny the allegations in paragraph 50 and, therefore, denies those allegations and demands strict proof thereof.

51. American Honda denies the allegations in paragraph 51 and demands strict proof thereof.

52. American Honda denies the allegations in paragraph 52 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count X of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XI

(Breach of Warranty - Honda of America Manufacturing, Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1- 52 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XI are not directed towards American Honda; therefore, no response is required. However,

to the extent a response is required, American Honda denies the allegations in paragraphs 53-56 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XI of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XII

(Breach of Warranty - Honda Motor Co., Ltd.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-56 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XII are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 57-60 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XII of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XIII

(Strict Liability - American Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1- 60 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

61. American Honda denies the allegations in paragraph 61 and demands strict proof thereof.

62. American Honda denies the allegations in paragraph 62 and demands strict proof thereof.

63. American Honda denies the allegations in paragraph 63 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XIII of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XIV

(Strict Liability - Honda of America Manufacturing, Inc..)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-63 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XIV are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 64-66 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XIV of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XV
(Strict Liability - Honda Motor Co., Ltd.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-66 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XV are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 67-69 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XV of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XVI
(Strict Liability - American Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-69 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

70. American Honda denies the allegations in paragraph 70 and demands strict proof thereof.

71. American Honda denies the allegations in paragraph 71 and demands strict proof thereof.

72. American Honda denies the allegations in paragraph 72 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XVI of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XVII
(Strict Liability - Honda of America Manufacturing, Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-72 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XVII are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 73-75 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XVII of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XVIII
(Strict Liability - Honda Motor Co., Ltd.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-75 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XVIII are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the

allegations in paragraphs 76-78 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XVIII of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XIX

(Negligence - American Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-78 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

79. American Honda denies the allegations in paragraph 79 and demands strict proof thereof.

80. American Honda denies the allegations in paragraph 80 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XIX of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XX

(Negligence - Honda of America Manufacturing, Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-80 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XX are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 81-82 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XX of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXI

(Negligence - Honda Motor Co., Ltd.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-82 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XXI are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 83-84 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXI of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXII
(Negligence - American Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-84 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

85. American Honda denies the allegations in paragraph 85 and demands strict proof thereof.

86. American Honda denies the allegations in paragraph 86 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXII of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXIII
(Negligence - Honda of America Manufacturing, Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-86 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XXIII are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 87-88 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXII of the Complaint be dismissed with prejudice,

that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXIV
(Negligence - Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-88 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XXIV are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 89-90 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXIV of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXV
(Breach of Warranty - American Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-90 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

91. American Honda specifically denies that it designed, manufactured, assembled, inspected, or tested the vehicle described in paragraph 4 of plaintiffs' Complaint. American Honda admits that it distributed the vehicle. American Honda admits only its express warranties and

warranties that arise as a matter of law. American Honda denies the remaining allegations in paragraph 91 and demand strict proof thereof.

92. American Honda is without sufficient information or knowledge to admit or deny the allegations in paragraph 92 and, therefore, denies those allegations and demands strict proof thereof.

93. American Honda denies the allegations in paragraph 93 and demands strict proof thereof.

94. American Honda denies the allegations in paragraph 94 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXV of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXVI

(Breach of Warranty - Honda of America Manufacturing, Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-94 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XXVI are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 95-98 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXVI of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXVII

(Breach of Warranty - Honda Motor Co., Ltd.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-98 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XXVII are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 99-102 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXVII of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXVIII

(Breach of Warranty - American Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-102 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

103. American Honda specifically denies that it designed, manufactured, assembled, inspected, or tested the vehicle described in paragraph 4 of plaintiffs' Complaint.

American Honda admits that it distributed the vehicle. American Honda admits only its express warranties and warranties that arise as a matter of law. American Honda denies the remaining allegations in paragraph 91 and demand strict proof thereof.

104. American Honda is without sufficient information or knowledge to admit or deny the allegations in paragraph 104 and, therefore, denies those allegations and demands strict proof thereof.

105. American Honda denies the allegations in paragraph 105 and demands strict proof thereof.

106. American Honda denies the allegations in paragraph 106 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXVIII of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXIX

(Breach of Warranty - Honda of America Manufacturing, Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-106 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XXIX are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 107-110 and demands strict proof

thereof.

WHEREFORE, American Honda respectfully requests that Count XXIX of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXX

(Breach of Warranty - Honda Motor Co., Ltd.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-110 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XXX are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 111-114 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXX of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXXI

(Strict Liability - American Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-114 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

115. American Honda denies the allegations in

paragraph 115 and demands strict proof thereof.

116. American Honda denies the allegations in paragraph 116 and demands strict proof thereof.

117. American Honda denies the allegations in paragraph 117 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXXI of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXXII

(Strict Liability - Honda of America Manufacturing, Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-117 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XXXII are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 118-120 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXXII of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXXIII

(Strict Liability - Honda Motor Co., Ltd.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-120 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XXXIII are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 121-123 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXXIII of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXXIV

(Strict Liability - American Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-123 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

124. American Honda denies the allegations in paragraph 124 and demands strict proof thereof.

125. American Honda denies the allegations in paragraph 125 and demands strict proof thereof.

126. American Honda denies the allegations in paragraph 126 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXXIV of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXXV

(Strict Liability - Honda of America Manufacturing, Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-126 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XXXV are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda denies the allegations in paragraphs 127-129 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXXV of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

COUNT XXXVI

(Strict Liability - Honda Motor Co., Inc.)

American Honda repeats and realleges each and every response to the allegations in the foregoing introductory paragraphs 1-129 of this Complaint in their entirety as if fully set forth herein and incorporate them by reference.

The allegations in Count XXXVI are not directed towards American Honda; therefore, no response is required. However, to the extent a response is required, American Honda

denies the allegations in paragraphs 130-132 and demands strict proof thereof.

WHEREFORE, American Honda respectfully requests that Count XXXVI of the Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

American Honda hereby denies any and all allegations not addressed specifically above.

AFFIRMATIVE DEFENSES

American Honda hereby raises the following affirmative defense to plaintiffs' Complaint.

Defense No. 1

(Failure to State a Claim)

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

Defense No. 2

(Abuse or Misuse of Product)

All of the injuries and damages alleged by plaintiff were caused by abuse and/or misuse of the subject vehicle by plaintiff, plaintiff's decedent or third parties for whom American Honda is not and was not responsible.

Defense No. 3
(Contributory Negligence)

All of the injuries and damages alleged by plaintiff were caused by the contributory negligence of plaintiff, plaintiff's decedent or third parties for whom American Honda is not and was not responsible.

Defense No. 4
(Intervening or Superseding Cause)

All of the injuries and damages alleged by plaintiff were caused by the intervening or superseding acts and/or omissions of plaintiff, plaintiff's decedent and/or third parties for whom American Honda is not and was not responsible.

Defense No. 5
(No Proximate Cause)

There exists no proximate causation between American Honda's alleged acts and omissions and the alleged injuries and damages claimed by plaintiff, thereby barring any recovery against American Honda.

Defense No. 6
(Failure to Comply With Warranty)

The plaintiff or other third parties failed to comply with the terms of applicable warranties thereby barring any recovery from American Honda for any purported breach of warranty.

Defense No. 7
(Limitations)

Plaintiff's claims are barred by the Statute of Limitations.

Defense No. 8
(Alteration or Modification)

All of the injuries or damages alleged by plaintiff were caused by the alteration or modification of the subject vehicle by plaintiff, plaintiff's decedent or third parties for whom American Honda is not and was not responsible.

Defense No. 9
(Assumption of the Risk)

The injuries or damages alleged by plaintiff were caused in whole or in part by the decedent's assumption of the risk.

Defense No. 10
(Preemption)

Plaintiffs' claims are preempted by Federal law.

Defense No. 11
(Statutory Defenses)

American Honda pleads all defenses available under the laws of the District of Columbia.

WHEREFORE, American Honda hereby respectfully requests that the entire Complaint be dismissed with prejudice, that it be awarded its costs and attorneys' fees, and such other and further relief as this Court deems just.

Respectfully submitted,

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(4)

Supreme Court, U.S.
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OCT 22 1999
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No. 98-1811

IN THE

Supreme Court of the United States

Alexis Geier, *et al.*,

Petitioners,

v.

American Honda Motor Company, Inc., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether an automobile manufacturer's compliance with a federal motor vehicle safety standard promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), preempts state common law claims that an automobile was defectively designed because it lacked an airbag where (1) the Safety Act expressly provides that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law"; and (2) the federal safety standard was a minimum performance standard that encouraged, but did not require, the installation of airbags in cars?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioners Alexis Geier, William Geier, and Claire Geier and respondents American Honda Motor Company, Inc., Honda of America Manufacturing, Inc., and Honda Motor Company, Ltd. (collectively, "Honda").

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 166 F.3d 1236. The order of the district court granting defendants' motion for summary judgment (Pet. App. 17-21) is not reported.

JURISDICTION

The court of appeals entered judgment on February 5, 1999. This Court granted the petition for a writ of *certiorari* on September 10, 1999. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY AND REGULATORY PROVISIONS

This case involves the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 ("Standard 208"). Relevant portions of the Safety Act and Standard 208 are in an appendix to this brief.[1]

STATEMENT OF THE CASE

A. Introduction. Congress passed the Safety Act in 1966 to reduce motor vehicle injuries and deaths. To achieve that goal, Congress authorized the federal government to issue minimum safety standards for motor vehicle performance. 15 U.S.C. §§ 1391(2), 1392(a). At the same time, Congress made clear that "[c]ompliance with any Federal motor vehicle safety standard does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). In keeping with this statutory directive, for 20 years after the Act's passage, the

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[1] On July 5, 1994, Congress recodified the Safety Act "without substantive change." Pub. L. No. 103-272, 108 Stat. 745, 941. The relevant recodified provisions are also set forth in the appendix.

nation's appellate courts unanimously agreed that common law claims are not preempted by the Safety Act or by federal motor vehicle safety standards.[2]

Against this backdrop, in 1984, the National Highway Traffic Safety Administration ("NHTSA") amended the federal motor vehicle safety standard governing occupant restraint systems – Standard 208 – to include a performance requirement encouraging, but not requiring, the installation of airbags. Consistent with the Safety Act's dictate, NHTSA never suggested that compliance with Standard 208 would preempt any common law claims involving airbags. To the contrary, the agency found that "the most effective system is an airbag plus a lap belt and shoulder harness" (49 Fed. Reg. 28962, 28986 (1984)) and, in keeping with Congress' express preservation of common law claims, specifically noted that "potential liability for any deficient systems" would help spur auto manufacturers to install the best system. *Id.* at 29000.

This lawsuit harmonizes well with Congress' and NHTSA's actions. Petitioners allege that Honda should have

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[2] *See Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968); *Kippen v. Ford Motor Co.*, 546 F.2d 993, 1000 (D.C. Cir. 1976); *Fox v. Ford Motor Co.*, 575 F.2d 774, 778 (10th Cir. 1978); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1978), *cert. denied*, 450 U.S. 959 (1981); *Dorsey v. Honda Motor Co., Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1198 (Ala. 1985); *Volkswagen of America, Inc. v. Young*, 321 A.2d 737, 746 (Md. App. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 345 N.E.2d 683, 688 (Mass. 1976); *Arbet v. Gussarson*, 225 N.W.2d 431, 438 (Wis. 1976).

done more than the bare minimum required by Standard 208 and that Alexis Geier would not have been seriously injured if the 1987 Honda Accord she was driving contained the system NHTSA called the "most effective": an airbag plus a lap belt and shoulder harness. The lower court nonetheless held that, even if this allegation is true and Honda would be held liable at common law, Honda is immune from suit solely because it complied with Standard 208. This ruling violates the plain terms of the Safety Act, misconstrues Standard 208, and improperly interferes with both the power of the states in our federal system and the power of Congress to establish the law.

B. The Safety Act. Congress enacted the Safety Act in response to the deaths and injuries resulting from unsafe vehicles. *See* S. Rep. No. 89-1301, 89th Cong., 2d Sess., 1-2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2709-10; H.R. Rep. No. 89-1776, 89th Cong., 2d Sess. 10-11 (1966). The Act's sole stated purpose is "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. *See also Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 55 (1983) ("Congress intended safety to be the pre-eminent factor under the Act.").

To this end, Congress empowered the Department of Transportation to prescribe "motor vehicle safety standards" that "shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms." 15 U.S.C. § 1392(a). The Act further defines "safety standards" as "*minimum* standard[s] for motor vehicle *performance* or motor vehicle equipment *performance*. . .." 15 U.S.C. § 1391(2) (emphases added). In issuing these minimum performance standards, the agency is directed to consider "relevant available motor vehicle safety data," whether the proposed standard "is reasonable, practicable and appropriate" for the particular type of motor vehicle, and the "extent to which such standards will contribute

to carrying out the purposes" of the Act. 15 U.S.C. § 1392(f)(1), (3), (4).

When it enacted the Safety Act, Congress was fully aware of the existence of state common law design defect lawsuits against manufacturers.[3] For that reason, Congress explicitly addressed what it did and did not intend to preempt in two separate sections of the Safety Act: the preemption provision and the savings clause. The former does not mention common law claims. Rather, it states in pertinent part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

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[3] *See, e.g., Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 1256-57 (1966) ("*House Hearings*") (testimony of Representative Charles P. Farnsley regarding design defect litigation involving the General Motors Corvair); *id.* at 1315 (statement of Daniel P. Moynihan regarding *Comstock v. General Motors Corp.*, 99 N.W. 2d 627 (Mich 1959)); *id.* at 1351 (statement of Mr. Maurice A. Gargell concerning Corvair design defect litigation); *Hearings on S. 3005 Before the Senate Committee on Commerce*, 89th Cong., 2d Sess. 252 (1966) (testimony of Dr. Seymour Charles noting pendency of 100 lawsuits challenging safety design of the Corvair). *See also generally* Kurt B. Chadwell, *Automobile Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 Baylor L. Rev. 141, 178 n.223 (1994).

15 U.S.C. § 1392(d).

The Safety Act's savings clause, in contrast, expressly refers to common law. It provides that "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

C. Standard 208. Standard 208 sets forth minimum performance requirements for the protection of vehicle occupants in crashes. *See* 49 C.F.R. § 571.208. The version of Standard 208 at issue here was promulgated in 1984, in response to this Court's decision in *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983). Under this rule, manufacturers were encouraged, but not required, to install airbags in their vehicles. (Current law, in contrast, requires airbags in all new vehicles. *See* 49 U.S.C. § 30127(b); 58 Fed. Reg. 46551 (1993)). Although this case involves the 1984 amendments to Standard 208, a brief review of the Standard's prior history is essential to understanding the purposes of the 1984 rule.

1. Regulatory History. As originally issued in 1967, Standard 208 simply required the installation of seatbelts in all automobiles. *See State Farm*, 463 U.S. at 34. However, "[i]t soon became apparent that the level of seatbelt use was too low to reduce traffic injuries to an acceptable level." *Id.* NHTSA therefore began considering "passive restraint systems" that do not require any independent action by the vehicle's occupant. *Id.* at 35. Two types of automatic protection emerged from the investigation: automatic seatbelts and airbags. *Id.* Ultimately, the agency's investigation showed that these passive restraints were substantially safer than manual alternatives, potentially saving approximately 12,000 deaths and 100,000 serious injuries annually. *Id.*

Based on these findings, in 1969, NHTSA proposed a rule that would have required the installation of passive restraints in automobiles. *See id.* After extensive rulemaking proceedings, during which the agency repeatedly amended the rule to require various sorts of passive restraints, *see id.* at 35-36, and the automobile industry waged "the regulatory equivalent of war against the airbag," *id.* at 49-50, NHTSA suspended the passive restraint requirement in 1976. *Id.* at 36. Although Transportation Secretary William Coleman concluded that airbags were safe and effective, he decided not to mandate passive restraints because he expected that there would be "widespread public resistance to the new systems." *Id.* at 37.

Secretary Coleman's successor, Brock Adams, reversed the decision and mandated the phasing in of passive restraints for model years 1982 to 1984. *Id.* The two principal systems that would satisfy the standard were airbags and automatic seat belts; the choice of which system to install was left to the manufacturers. *See id.* Seven months before the first deadline, however, new Transportation Secretary Drew Lewis delayed and then rescinded that order "due to changed circumstances and, in particular, the difficulties of the automobile industry." *Id.* at 38. Finding that most manufacturers would install detachable automatic seatbelts rather than the far-safer airbags, he ruled that the passive restraint requirement would defeat auto safety, because the automatic seatbelts would simply be detached. *Id.* at 38-39.

In 1983, this Court in *State Farm* held that the rescission of Standard 208 was arbitrary and capricious. *Id.* at 57. The Court was especially critical that, after deciding that detachable automatic seat belts would not work, NHTSA had not even considered requiring airbags as the only form of passive restraints. *Id.* at 48. This was clearly arbitrary, in the Court's view, because "the agency's original proposed Standard

contemplated the installation of inflatable restraints [*i.e.* airbags] in all cars." *Id.* at 46.[4] Since that time, the agency had reaffirmed "the life-saving potential of the airbag" as a highly effective form of passive restraint. *Id.* at 47-48. "Given the effectiveness ascribed to airbags by the agency," the Court wrote, "the mandate of the Act to achieve traffic safety would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags." *Id.* at 48. Because "NHTSA's . . . analysis of airbags was nonexistent," *id.*, the Court vacated the agency's decision rescinding Standard 208 and remanded for further consideration. *Id.* at 57.

2. The 1984 Rule. In the aftermath of *State Farm*, Secretary of Transportation Elizabeth Dole reinstated the passive restraint requirement, with a phase-in period beginning September 1, 1986, and full implementation required by September 1, 1989. 49 Fed. Reg. 28962 (1984).[5] Under the new rule, auto manufacturers could satisfy the passive restraint requirement "by using automatic detachable or nondetachable

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[4] The Court noted that, "[w]hile NHTSA's 1970 passive restraint requirement permitted compliance by means other than the airbag . . . , '[t]his rule was a de facto air bag mandate since no other technologies were available to comply with the standard.'" *Id.* at 46 n.11 (citation omitted).

[5] Under the phase-in schedule, "a minimum of 10 percent of all cars manufactured after September 1, 1986, must have automatic occupant crash protection. After September 1, 1987, the percentage is raised to 25 percent; after September 1, 1988, it is raised to 40 percent; and after September 1, 1989, all new cars must have automatic occupant crash protection." 49 Fed. Reg. 28999. The rule further provided that the requirement for passive restraints would be rescinded if, by the end of the phase-in period (April 1, 1989), mandatory seatbelt use laws ("MULs") were passed by enough states to cover two-thirds of the U.S. population. *Id.* at 28963. This never occurred, and the MUL provision was ultimately deleted. *See* 58 Fed. Reg. 46563 (1993).

belts, *airbags*, passive interiors, or other systems that will provide the necessary level of relief." *Id.* at 28996 (emphasis added). Thus, under this version of the rule (which applies to petitioners' vehicle in this case), manufacturers were permitted, but not required, to use airbags in their vehicles.[6]

Because this Court had found the prior Secretary's decision arbitrary and capricious for failing to consider an "airbags only" requirement, Secretary Dole went to some length to explain why the agency was not requiring "airbags only" – instead of automatic seat belts and other types of passive restraints – in all cars. First, comparing the two, she said that "[a]lthough airbags may provide greater safety benefits, when used with belts, and potentially larger injury premium reductions than automatic belts, they are unlikely to be as cost effective." *Id.* at 29001. Second, Secretary Dole expressed concern that, due to public unfamiliarity with the technology, a government-mandated "airbags only" rule "could lead to a backlash affecting the acceptability of airbags." *Id.* Third, Secretary Dole noted that several commenters "questioned the Department's authority to issue an "airbags only" standard, claiming that it would be a 'design' standard." *Id.* She said that, "[e]ven if the Department could legally issue a performance standard that could only be met by an airbag under present technology," doing so would create "a number of problems" and could "unnecessarily stifle innovation" in other types of passive systems, such as automatic belts and passive

[6] The agency noted that airbag technology had already been employed by various auto makers at various times. *See, e.g.*, 49 Fed. Reg. at 28965 (noting that, between "1973 and 1976, General Motors produced approximately 11,000 full-sized Chevrolets, Buicks, Oldsmobiles and Cadillacs equipped with airbags, . . . Ford installed airbags in 831 Mercurys, [and] a small number were installed in Volvos also.") NHTSA further noted that, since the early 1980s, Mercedes Benz had sold approximately 22,000 airbag-equipped cars worldwide. *Id.*

interiors. *Id.* For these and other reasons, the agency declined to mandate airbags in all vehicles. *See id.*

The agency made clear, however, that systems that included airbags were the preferred option. Secretary Dole repeatedly emphasized that the safest system was precisely the one that the petitioners seek to prove was an available, safer design in this case: "*the most effective system is an airbag plus a [manual] lap and shoulder belt.*" *Id.* at 28986 (emphasis added). *See also id.* at 28984. The Secretary also emphasized that this was not merely the agency's opinion; to the contrary, the auto manufacturers themselves acknowledged that "the combination of an airbag and manual lap and shoulder belts . . . [is] the most effective system of all." *Id.* at 28966.

In keeping with these observations, the new rule was designed to encourage the development and availability of airbags. As NHTSA explained, "[a]utomatic occupant protection systems that do not totally rely on belts, such as airbags or passive interiors, offer significant additional potential for preventing fatalities and injuries, at least in part because the American public is likely to find them less intrusive; *their development should be encouraged through appropriate incentives.*" 49 Fed. Reg. at 28963 (emphasis added).

The first such incentive was the use of a phase-in requirement that permitted manufacturers gradually to install passive restraints over a three-year period. Secretary Dole explained, *id.* at 29000 (emphasis added):

> If the Department had required full compliance by September 1, 1987, it is very likely all of the manufacturers would have had to comply though the use of automatic belts. Thus, *by*

> *phasing-in the requirement, the Department makes it easier for manufacturers to use other, perhaps better, systems such as airbags and passive interiors.*

The second incentive to "encourage the use of non-belt technologies during the phase-in period" (*id.* at 28997) was to give manufacturers "extra credit" toward their percentage requirement if they used "something other than an automatic belt to provide the automatic protection to the driver." *Id.* at 29001. Under the rule, "[f]or each car in which they do so [*i.e.*, install a non-belt passive restraint, such as an airbag], they will receive credits for an extra one-half automobile toward their percentage requirement." *Id.* at 29000. Although the credit could be earned by non-belt passive restraints other than airbags (such as "passive interiors," *see id.* at 28965), NHTSA "believe[d] that the primary system that would be used under this 'extra credit' alternative would be the airbag." *Id.* at 29000. This was desirable because "airbags should provide very significant safety benefits." *Id.* The agency added that, "[e]ven though fewer cars would be equipped with automatic protection if extra credit is given for airbag automobiles," the tradeoff was worth it because "airbags – when used with belts – are very effective." *Id.*

The final incentive identified by the agency to encourage the use of non-belt alternatives – such as airbags – was the threat of future liability imposed through the tort system. According to Secretary Dole, "[s]ome commentators on the rule suggested that [auto] manufacturers would use the cheapest system [automatic seatbelts] to comply with the automatic restraint requirement . . .." *Id.* at 29000. In response, she stated that "the Department does not agree with this contention. It believes that competition, *potential liability for any deficient systems*, and pride in one's product would prevent

this." *Id.* (emphasis added). Thus, the agency believed that "potential liability" could create an incentive for manufacturers to avoid the cheapest passive restraint systems in favor of safer alternatives – such as the one the agency identified as the safest alternative of all: "an airbag plus a lap and shoulder belt." 49 Fed. Reg. at 28986.

In keeping with this third incentive, the preamble to the 1984 rule contains no indication that the agency sought to preempt any common law tort claims involving airbags or any other type of occupant restraint. To the contrary, in addition to the remark noted above, Secretary Dole explicitly noted comments that the auto manufacturers could be sued by crash victims who were injured because their cars lacked airbags:

> Another potential source of manufacturer liability was raised by Stephen Teret, representing the National Association for Public Health Policy:
>
> "If a reasonable means of protection is being denied to the motoring public, the denial should lead to liability, even if the liability can be imposed on each and every car manufacturer. People whose crash injury would have been averted had the car been equipped with an air bag can sue the car manufacturer to recover the dollar value of the injury."

Id. at 28972. *See also id.* at 28971 (discussing various comments relating to potential product liability claims involving airbags under the 1984 rule). Thus, the agency was aware of the possibility of future damage actions involving airbags, yet it never suggested that such claims would conflict

with the 1984 version of Standard 208 – or that such claims would be preempted.

D. This Litigation. In 1992, Alexis Geier was driving a 1987 Honda Accord in the District of Columbia. J.A. 2. At the time the vehicle was manufactured, Standard 208 required Honda to install some form of passive restraint in at least 10 percent of its cars (*see* n.5, *supra*), and permitted Honda to install passive restraints (including airbags) in all of its cars. Honda elected not to install any passive restraint in the vehicle driven by Ms. Geier; rather, her car contained the type of system – a manual three-point lap belt and shoulder harness – that was still permitted by Standard 208 during the phase-in period, but would be legally barred thereafter.

At the time of the accident, Ms. Geier was wearing the lap belt and shoulder harness provided for the driver in the design of the car. Rounding a curve, the vehicle spun out of control and collided with a tree. The lap belt and shoulder harness did not adequately protect Ms. Geier, and she sustained multiple serious injuries. J.A. 2-5.

On January 12, 1995, Ms. Geier and her parents filed this lawsuit seeking damages against Honda under the common law of the District of Columbia on theories of negligence, breach of warranty, and strict product liability. J.A. 5-42. Petitioners allege that the 1987 Honda Accord was negligently and defectively designed because it lacked "an effective and safe passive restraint system, including, but not limited to airbags . . ." (J.A. 3-4), and that, if the car had contained a driver's-side airbag in addition to the manual lap belt and shoulder harness, Ms. Geier would not have been seriously injured in the crash.

Even though the design advocated by petitioners was fully consistent with Standard 208 (and was the safest option identified by NTHSA in the preamble to the rule), Honda moved for summary judgment on the ground that the Geiers' claims are preempted by the Safety Act and Standard 208. Pet. App. 17. The district court granted the motion and the court of appeals affirmed, holding that petitioners' claims were impliedly preempted because they conflict with the goals of Standard 208. Pet. App. 17-20.

The appeals court first acknowledged it would be "problematic" to find petitioners' claims expressly preempted in light of both the Act's "broadly worded savings clause" and the strong presumption against finding express preemption of common law claims when Congress' intent to preempt "is not clear from the statute's language." Pet. App. 10-11. Given the broad wording of the savings clause, the court reasoned, "it would be difficult to discern a 'clear and manifest purpose of Congress' to preempt a design defect claim based on the absence of an airbag." Pet. App. 11 (citations omitted).

The lower court ultimately decided that it need not resolve the express preemption question, however, since it instead found implied preemption of petitioners' claims. Pet. App. 12. The court first rejected petitioners' assertion that, under *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Safety Act's clear express preemption provisions preclude any inquiry into implied preemption. App. 14. The court went on to hold that petitioners' claims are "implicitly preempted" on the ground that they conflict with the regulatory framework established by Standard 208. App. 16. While conceding that the 1984 rule "does not mandate or forbid the use of airbags" (Pet. App. 14), the court held that imposition of common law liability for failure to install an airbag would frustrate the federal government's goals of "encouraging both public

acceptance of the airbag technology and experimentation with better passive restraint systems." Pet. App. 15. Thus, the court concluded, Ms. Geier had no right to seek compensation for her injuries at common law.

SUMMARY OF ARGUMENT

In determining whether a state cause of action is preempted by federal law, the Court's sole task is to ascertain the intent of Congress. This determination of Congressional intent is not made in a vacuum; rather, it is informed by a strong presumption against preemption that can be overcome only by a clear manifestation of congressional intent to the contrary.

Measured in this light, it is clear that Congress did not intend to preempt common law tort claims under the Safety Act. Indeed, the two provisions of the Safety Act that set forth Congress's intent with respect to preemption – the preemption provision (15 U.S.C. § 1392(d)) and the savings clause (15 U.S.C. § 1397(k)) – reveal that common law claims are expressly *preserved*, not preempted.

The language of the preemption provision shows that Congress only intended to preempt state *legislative* or *administrative* safety standards that are not identical to federal safety standards governing the same aspect of motor vehicle performance, and not to preempt common law tort actions. Thus, the Safety Act's express preemption provision does not even encompass common law tort claims.

Any doubt on this point would be dispelled by the savings clause, which states in sweeping and unambiguous terms that "compliance with any . . . safety standard . . . does not exempt any person from any liability under common law." Both the plain language of this "anti-preemption" provision and

its legislative history leave no room for a conclusion that petitioners' claims are expressly preempted by the Safety Act.

Nor are petitioners' claims impliedly preempted by the Safety Act. This Court has made clear that, where Congress has spoken directly and clearly on the issue of preemption – as it did in the Safety Act – there can be no finding of implied preemption. Because the Safety Act contains both an express preemption provision and an express anti-preemption provision manifesting a congressional intent *not* to preempt, any inquiry into implied conflict preemption is precluded. Thus, all of Honda's arguments about the alleged conflict between petitioners' claims and Standard 208 are irrelevant.

Even assuming, however, that this Court could reach the issue of implied conflict preemption in this case, there is no preemption here since petitioners' claims do not conflict with the Safety Act or Standard 208. Implied conflict preemption applies only where it is impossible for a private party to comply with both state and federal requirements or where state law would frustrate the full purposes and objectives of Congress. Impossibility is not an issue in this case, since Standard 208 undisputably would have permitted installation of an airbag in Ms. Geier's 1987 Honda and, in any event, would allow Honda to pay damages to the Geiers.

Similarly, petitioners' claims do not frustrate any federal purpose. First, this lawsuit does not frustrate any Congressional purpose, since Congress made clear (in the Act's savings clause) that the preservation of common law claims would *aid* the accomplishment and execution of its full purposes. Congress recognized that federal regulations and common law liability can and should work together to create safer vehicles. Given Congress' expressed desire to preserve all common law claims, petitioners' claims would not frustrate the purpose of

the Safety Act. But a finding of implied preemption here would.

Petitioners' claims are also consistent with the goals underlying Standard 208. As Congress intended, NHTSA promulgated Standard 208 as a minimum performance standard and left the common law undisturbed. NHTSA noted, however, that the "most effective" system was "an airbag plus a lap belt and shoulder harness," 49 Fed. Reg. at 28986, and explicitly relied on several incentives to encourage the use of airbags – including the threat of "potential liability for any deficient system." *Id.* at 29000. Petitioners' attempt to hold Honda liable for failing to install an airbag (in addition to a manual lap belt and shoulder harness) in the 1987 Honda Accord is in perfect harmony with this approach.

Finally, contrary to the lower court's ruling, petitioners' claims do not frustrate the goals identified by NHTSA in its 1984 rule of "allowing consumers to adjust to the new [airbag] technology" and "permitting experimentation with designs for even safer systems." Pet. App. 15. Regarding the former, the agency declined to require airbags in all cars by administrative fiat partly because it feared a public backlash. No such backlash would result from common law liability in a no-airbag suit, however, both because a manufacturer would not likely change its conduct in response to a jury verdict and because, even if the manufacturer did, it would make every effort to *promote* public acceptability of airbags. This lawsuit is also in line with NHTSA's goal of promoting technological experimentation, since (as Secretary Dole recognized) the common law tort system actually encourages manufacturers to experiment with safer product designs. Because petitioners' claims are entirely consistent with – and actually advance – the goals underlying Standard 208, the lower court's finding of implied conflict preemption is in error.

ARGUMENT

This case is about federalism and the separation of powers. For decades, this Court has emphasized that federal preemption analysis is governed by two bedrock legal principles based on these Constitutional concerns.

First, as the Court recently reaffirmed in *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996), a party seeking preemption of state law bears a heavy burden of overcoming the long-standing "presum[ption] that Congress does not cavalierly pre-empt state-law causes of action." In all preemption cases, a court must start with an assumption "that the States' historic police powers cannot be superseded by a Federal Act unless that is Congress' clear and manifest purpose." *Id.* (citation omitted). These are not empty platitudes; they stem from and protect our Constitutional system of federalism. *See, e.g., Jones v. Rath Packing*, 430 U.S. 519, 525 (1977) (the presumption against preemption "provides assurance that 'the federal-state balance' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts.") (citation omitted).

This presumption is especially strong where, as in this case, preemption would displace the historic power of the states to protect the health and safety of their citizens. *See Medtronic*, 518 U.S. at 485. Moreover, where preemption of common law claims would leave injured individuals without any state or federal remedy, which is the result sought by Honda here, a court may find preemption only in the most compelling circumstances. *See English v. General Electric Corp.*, 496 U.S. 72, 87-90 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

Second, in determining whether a state cause of action is preempted by federal law, the Court's "sole task is to

ascertain the intent of Congress." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (plurality). This principle, too, is Constitutionally-based; it derives from and preserves the separation of powers, limiting the courts to their Constitutionally-assigned role. As long as Congress acts within the scope of its powers, the courts must stay true to Congress' intent. They are not free to use the doctrine of implied preemption (or anything else) to substitute their judgment for that of Congress.

I. Petitioners' Claims Are Not Expressly Preempted And, In Fact, Are Expressly Preserved.

The provisions of the Safety Act that set forth Congress' intent regarding preemption – the preemption provision (15 U.S.C. § 1392(d)) and the savings clause (15 U.S.C. § 1397(k)) – reveal that common law claims are *expressly preserved*, not preempted.

A. The Preemption Provision Does Not Encompass Common Law Claims.

The Safety Act's preemption provision states in pertinent part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d).

The most notable feature of this language is the absence of any reference at all to common law claims. Although the absence of an explicit reference to common law does not automatically preclude a finding of preemption, *see Cipollone*, 505 U.S. at 520-22, the absence of such a reference in Section 1392(d) *combined with* the express reference to "common law" in the Act's savings clause, 15 U.S.C. § 1397(k) (discussed in more detail below), defeats any notion that Congress intended the Safety Act's preemption provision to encompass common law claims. *E.g.*, *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (internal quotation marks omitted). *Accord Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).[7]

Even putting aside the absence of any reference to "common law" in the preemption provision, however, many other aspects of Section 1392(d) and the Safety Act demonstrate that Congress never intended to preempt tort suits against auto manufacturers.

First, the preemption provision only prohibits a State from establishing or continuing in effect a "safety standard" that

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[7] The absence of any reference to common law claims in the Act's preemption provision would be telling even if the savings clause did not exist. Congress has repeatedly shown its ability to refer to "common law" when it intends to include it within the scope of a preemption clause. *Compare, e.g.*, Copyright Act of 1976, 17 U.S.C. § 301(a) (1977) (preempting rights "under the common law, rule, or public policy"); Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. § 1715z-12, -18(e) (1989) (preempting any "State constitution, statute, court decree, common law, rule or public policy").

conflicts with a "Federal motor vehicle safety standard" established under the Act. Although the term "safety standard," standing alone, may not be wholly self-defining, it does not stand alone in Section 1392(d): rather, Congress used the same term in the same provision *twice* to refer, in the first instance, to the type of federal law that is to be accorded preemptive effect – a "Federal motor vehicle safety standard" – and, in the other, to the type of state law that is subject to preemption – again, a "safety standard." "Safety standard," moreover, is the term used throughout the Act to refer to the *administrative* standards that the Secretary is authorized to adopt pursuant to the Act.[8] The use of the same term to refer to the state norms that may be displaced by a Federal "safety standard" is, under normal rules of statutory construction, indicative that the term is meant to have the same meaning. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (It is a "basic canon of statutory construction that identical terms within an Act bear the same meaning.") (citing cases); *Morrison-Knudsen Const. v. Director, Office of Workers Comp. Programs*, 461 U.S. 624, 633 (1983) ("[A] word is presumed to have the same meaning in all subsections of the same statute."). *See also Medtronic*, 518 U.S. at 489 (plurality opinion) (citing other uses of the term "requirements" throughout statute to demonstrate that Congress' focus is "enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries"). Thus, the only sensible reading of the Safety Act's preemption provision

[8] *See, e.g.*, 15 U.S.C. § 1392(e) ("[t]he Secretary may by order amend or revoke any [f]ederal motor vehicle safety standard . . ."); *id.* at § 1392(h) ("[t]he Secretary shall issue initial [f]ederal motor vehicle safety standards. . ."); *id.* at § 1392(i)(1)(A) ("the Secretary shall publish proposed [f]ederal motor vehicle safety standards . . ."); *id.* at § 1392(i)(1)(B) ("the Secretary shall promulgate [f]ederal motor vehicle safety standards . . .").

is that a "safety standard" promulgated under the Act will only preempt a state legislative or administrative "safety standard" that is not identical to the federal standard.[9]

Second, the fact that Section 1392(d) limits the preempted field to state and local safety standards "with respect to" motor vehicles further demonstrates that preemption under the Safety Act is limited to state positive law. The tort duties under which plaintiffs seek compensation are not duties "with respect to" motor vehicles, but rather are *general* state-law responsibilities concerning the conduct of persons who manufacture and sell *all kinds* of products. On the other hand, state positive-law requirements to which the preemption provision is directed are, in fact, standards "with respect to" motor vehicles. *See Medtronic*, 518 U.S. at 501-02 (rejecting preemption of common law claims on ground that "the general state common-law requirements in this suit were not specifically developed 'with respect to' medical devices. Accordingly, they are not the kinds of requirements that Congress and the [agency] feared would impede the ability of federal regulators to implement and enforce specific federal requirements.").

Third, the "safety standards" referred to in the Safety Act's preemption provision are "*minimum* standards" that concern an "aspect of *performance*." This was not an idle

[9] In this respect, the Safety Act is markedly different from the statute in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993), which preempted any relevant "law, rule, regulation, order or standard," thus reaching virtually every method by which a State can impose legal obligations, and the 1969 statute in *Cipollone*, which used the sweeping term "requirement or prohibition . . . imposed under State law" to manifest Congress' intent to preempt all forms of State law. 505 U.S. at 521-22.

choice of words by Congress. As the Senate Report accompanying the Safety Act explained:

> Unlike the General Services Administration's procurement standards, which are primarily *design* specifications, both the interim standards and the new and revised standards are expected to be *performance* standards, specifying the required minimum safest performance of vehicles but not the manner in which the manufacturer is to achieve the specified performance. . . . The Secretary would thus be concerned with measurable *performance* of a braking system, but *not its design details*.

S. Rep. No. 89-1301, 89th Cong., 2d Sess. 6 (1966) (emphasis added). Common law claims, in contrast, do not set specific minimum performance standards; they focus – as motor vehicle safety standards do not – on the *manner* in which the manufacturer chose to achieve the specific performance. Indeed, this case focuses on whether Honda's *design* was negligent and/or defective.

Fourth, the preemption provision only applies to a safety standard "establish[ed]" or "continue[d] in effect" by a "State or political subdivision of a State." Construing an award of damages to a tort victim as "establishing" or "continuing in effect" an auto safety standard is at odds with the ordinary meaning of Congress' words. The duties relied on by tort claimants are general duties under the common law that have evolved over hundreds of years. Although a jury award of damages would represent confirmation of a pre-existing common law duty – for instance, the duty to act non-negligently – only an inept grammarian could construe an award of damages in a tort suit as "establishing" or "continuing in effect"

a safety standard or other regulation. On the other hand, it is common parlance to say that a previously "established" statute or regulation "continues in effect."

Fifth, it makes no sense to construe the term "State or political subdivision of a State" as encompassing a jury (or judge) in a tort case. Political subdivisions of states, such as counties and towns, often enact health and safety laws. For this reason, it was logical for Congress to include "political subdivisions" in the coverage of the Act's preemption provision, lest there be some ambiguity as to the breadth of the term "State." At the same time, no one would ordinarily describe an award of damages by a jury or judge as being issued by a "State or political subdivision of a State." And it is impossible to say that a jury or judge in an Article III *federal* court is in any sense a "State or political subdivision thereof."

Sixth, the Safety Act defines a "motor vehicle safety standard" as a "minimum standard for motor vehicle performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. § 1391(2). This definition plainly encompasses state statutory and administrative performance standards and, just as plainly, does not encompass either general common law duties or jury verdicts applying those duties in specific cases, neither of which "provide objective criteria" of the type set forth in administrative regulations.

Seventh, Section 1392(d) contains certain exceptions that further show that Congress did not intend to preempt common law claims. After describing its preemptive reach, the statute provides that (1) states may "enforce" safety standards that are "identical" to Federal safety standards; and (2) Federal, state, and local governments may, with respect to vehicles procured for their own use, establish safety requirements that

impose "a higher standard of performance" than that imposed by an otherwise applicable federal standard. App. 1. Once again, these provisions plainly relate to federal, state, and local standards concerning the actual performance of vehicles – not to common law claims, which have no conceivable relevance to state and local "enforcement" of "identical" safety standards.

Eighth, if the preemption provision did apply to common law claims, it would, by its terms, preempt virtually *all* common law claims involving aspects of motor vehicle performance governed by a federal safety standard, including those routinely allowed by the courts over the past 30 years. *See* n.2, *supra*. Federal motor vehicle safety standards are currently in effect as to almost all aspects of performance of motor vehicles and their equipment. If Honda is right, and the preemption provision encompasses all common law claims "which [are] not identical to [a] Federal standard" governing the same "aspect of performance," 15 U.S.C. § 1392(d), then NHTSA's rules preempt almost all common law claims, leaving design defect victims with no remedy.

This cannot be what Congress intended, especially since the Safety Act provides no form of compensation for victims of defectively designed automobiles. To use the words of *Medtronic*, "[Honda's] construction of [the statute] would therefore have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation . . . It is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct,' and it would take language much plainer than the text of [Section 1392(d)] to convince us that Congress intended that result." 518 U.S. at 487 (plurality)

(citation omitted). The same reasoning is applicable here. Section 1392(d) does not encompass common law claims.[10]

B. The Savings Clause Expressly Preserves Common Law Claims.

If any doubt remained as to the inapplicability of the Safety Act's express preemption provision to common law claims, it would be dispelled by the Safety Act's express *anti-preemption provision* – the savings clause – which unambiguously *preserves* all common law claims. It states in simple and straightforward terms: "Compliance with *any* Federal motor vehicle safety standard issued under this subchapter does not exempt *any* person from *any* common law liability." 15 U.S.C. § 1397(k) (emphasis added).

On its face, the savings provision is sweeping and unambiguous. "Compliance with any Federal . . . safety standard" is a phrase that does not admit of qualification. It cannot be read to mean only compliance with certain federal safety standards, or to except from its scope safety standards that deal with the particular question of design or performance at issue in a given common law action. Similarly, the phrase "does not exempt any person from any common law liability"

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[10] The revised and recodified version of the preemption provision makes even clearer that Congress did not intend to preempt common law claims. It provides in pertinent part: "When a motor vehicle safety standard is in effect under this chapter, a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter." 49 U.S.C. § 30103(b), App. 2. Although the revisions were intended to make no "substantive change," Congress' reference to safety standards being "prescribed" further evidences that Congress has always had legislative and administrative standards in mind.

does not on its face admit of qualification. "[A]ny common law liability" is all-inclusive. That phrase cannot fairly be read to mean that the Safety Act provides any basis for exempting any defendant from any common law liability.

In the lower court, Honda attempted to avoid the plain meaning of the savings clause by arguing that Section 1397(k) is not really addressed to federal preemption at all. Instead, Honda asserted that the savings clause was really designed to ensure that compliance with a minimum federal standard would not be a complete defense to liability under state law. This reading of the savings clause makes no sense, particularly in light of the interpretation of the Safety Act's preemption provision that Honda advanced below. According to Honda, Section 1392(d) expressly preempts all common law claims that relate to the same aspect of performance as a federal motor vehicle safety standard. If that is so, there would be no need for Congress to negate the affirmative state law defense of compliance with those claims, because they would already be extinguished by virtue of preemption.

Thus, under the reading advanced by Honda, the savings clause could only logically relate to claims that survive the preemption provision because they concern an aspect of motor vehicle performance that is *not* subject to a federal safety standard. But here Honda's argument breaks down completely, because there could be no affirmative defense of compliance with a federal standard that does not exist. In other words, under Honda's reading of the preemption provision, the savings clause could only apply in cases where it would necessarily have no legal effect. Honda would essentially render the section's plain language meaningless – an approach this Court has repeatedly disavowed. *See Freytag v. C.I.R*, 501 U.S. 868, 877 (1991) (our decisions "consistently have expressed a deep reluctance to interpret a statutory provision so as to render

superfluous other provisions in the same enactment.") (citations and internal quotation marks omitted).[11]

Honda also argued below that Section 1397(k) is merely a "general savings clause" and, as a rule, "general savings clauses" only reflect Congress' intent to preclude a finding of implied field preemption. This argument fails for three reasons. First, it blatantly conflicts with Honda's other argument about the meaning of Section 1397(k): *i.e.*, that the savings clause was designed to insure that mere compliance with a federal safety standard is not an absolute defense to liability at common law. Second, whatever the anti-preemptive effect of "general savings clauses" may be, Section 1397(k) is not a "general savings clause." It specifically addresses and preserves from federal preemption one aspect of state law: common law liability. Assertions about "general savings clauses" simply do not apply to it. Third, the assertion that Section 1397(k) only negates implied field preemption cannot be squared with the language of the preemption provision, which by its terms applies only when there is a federal safety standard in place and a state safety standard regulates "the same aspect of performance" as the federal standard. 15 U.S.C. § 1392(d). Thus, the scope of the preemption provision is clearly limited to situations where state and federal regulations *address the same matter*. The

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[11] Even putting aside these insurmountable flaws in Honda's reasoning, it would have made no sense for Congress to include a provision in the Safety Act negating the state law defense of compliance with federal safety standards. At the time the Safety Act was enacted (and still today), it was already the law in every state that compliance with a federal regulation is *not* an absolute defense in an action for negligent failure to do more. *See Restatement (Second) of Torts* § 288C (1964). *See also* Paul Deuffert, *The Role of Regulatory Compliance in Tort Actions*, 26 Harv. J. on Legis. 175 (1989). Since the law was already clear on this point at the time Congress enacted the Safety Act, Honda's interpretation would render the savings clause a nullity in more ways than one.

preemption provision cannot be read to give rise to any broader "field" preemption of matters not regulated by the federal agency. Accordingly, there would be no reason for the savings clause to address, and affirmatively negate, the prospect of such broader field preemption.

C. The Safety Act's Legislative History Confirms That Congress Intended To Preserve Common Law Claims.

Normally, the plain and unequivocal language of the preemption provision and the savings clause would preclude further analysis. *See, e.g., TVA v. Hill*, 437 U.S. 153, 184 n.29 (1984). But, if one looks to the Safety Act's legislative history, it only confirms that Congress intended to preserve all common law claims.

1. The Senate Bill. The bill reported out of the Senate Commerce Committee and passed by the full Senate contained a preemption provision similar to the bill ultimately enacted into law. *See* 112 Cong. Rec. 14,257 (1966). But the Senate bill did *not* include a savings provision. Even so, the Senate Committee Report stated, with respect to the preemption provision of the bill, that:

> [T]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law.

S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966). And Senator Magnuson, the sponsor of the Senate bill, stated on the floor of the Senate that:

> Compliance with Federal standards would not necessarily shield any person from broad liability at the common law. The *common law on product liability still remains as it was*.

112 Cong. Rec. 14,230 (1966) (emphasis added).

2. The House Bill. The original House bill contained a preemption provision similar to the preemption provision in the Senate bill, and, like the Senate bill, did not contain a savings clause. *See* H.R. 13228, 89th Cong., 2d Sess. (introduced on March 2, 1966). During hearings on that bill, however, Tom Triplett, an attorney from South Carolina, raised the following pointed concern regarding the possible effect of the House bill on the liability of manufacturers under state law:

> We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.
>
> You may think that the manufacturer is afraid of Government regulation but the cry you are hearing may be "Brer Fox, please don't throw me in the briar patch." If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of "Our product meets Government standards," and an already compounded problem will be recompounded.

House Hearings at 1249.

In direct response to Mr. Triplett's testimony, the House Committee amended the original House bill by inserting a savings provision identical in all respects to the savings provision ultimately signed into law: "Compliance with *any* Federal motor vehicle safety standard issued under this title does not exempt *any* person from *any* common law liability." *See* 112 Cong. Rec. at 19,657 (1966) (emphasis added). This savings provision was explained in the House Committee Report as follows:

> It is intended and this subsection specifically establishes, that *compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability.*

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added).

During the floor debates on the reported House bill, Representative O'Neill proposed an amendment that would have strengthened the remedial provisions of the bill by adding criminal penalties for willful violations of the Act. In opposing this amendment, Representative Dingell, a member of the House Committee that had reported the bill, stated:

> We are told . . . that this legislation is not strong enough. A look at the bill, at what the committee has brought to the floor, disproves this. . . . *[W]e have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle*

> *purchaser*. This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer, and they can be exercised against the manufacturer.

112 Cong. Rec. 19,663 (1966) (emphasis added).

The amendment was defeated. *Id.* at 19,664. The reported bill then passed the full House with certain minor amendments not relevant here. *Id.* at 19,664-19,669.

3. The Senate-House Conference. A Senate-House Conference Committee was convened to reconcile the differences between the Senate and House bills. The Conference Committee adopted the savings provision of the House bill *in haec verba*, and also adopted the House version of the preemption provision with certain minor changes not relevant here.

The Conference Committee Report made no mention of the Senate's agreement to the savings provision included in the House bill. But the Senate conferees' understanding of the savings provision was clearly stated on the floor of the Senate by Senator Magnuson, the sponsor of the Senate bill, as well as by Senator Cotton, a conferee. Senator Magnuson stated:

> The Senate conferees accepted the House provision that *compliance with Federal standards does not exempt any person from common law liability*. This provision makes explicit, in the bill, a principle developed in the Senate report. This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with

> Federal standards. No court rules of evidence are intended to be altered by this provision.

112 Cong. Rec. 21,487 (1966) (emphasis added). And Senator Cotton explained:

> The Senate conferees also yielded on a provision, inserted by the House, declaring that compliance with any Federal standard does not exempt any person from common law liability. Nevertheless, it seems clear and was, I believe, the consensus of the conferees on both sides, that proof of compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it.

Id. at 21,490.

* * *

In sum, the legislative history confirms that the Safety Act means what it says: Congress expressly preserved all common law claims. It is impossible to find in the preemption provision and the savings clause a "'clear' and 'manifest'" federal statutory purpose "[t]o displace traditional state [law] in such a manner." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (quotation omitted). To the contrary, Congress sought to achieve the Safety Act's purposes *both* by authorizing minimum federal performance standards *and* by preserving common law tort remedies for those injured in car accidents – and the incentive for design improvements that such remedies create.

This approach is hardly unusual. Congress has repeatedly preserved common law claims, despite their arguably regulatory effect, while preempting direct state

regulation. For example, in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), this Court held:

> The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. *We believe Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not. Cf. Silkwood v. Kerr McGee Corp.*, 464 U.S. at 256 (Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was preempted).

Id. at 185-86 (footnote omitted; emphasis added). Similarly, in *Cipollone*, seven members of this Court agreed that, although a 1965 cigarette labeling act expressly preempted state regulatory law, it did not preempt state common law, noting that "there is no general, inherent conflict between [express] federal preemption of state [regulatory] warning requirements and the continued vitality of state common law [damages] actions." 505 U.S. at 518 (plurality); *id.* at 533-34 (Blackmun, J., concurring).[12]

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[12] *See also, e.g., Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 211 (1996) (variations in state remedies have "long been deemed compatible with federal maritime interests," and the lack of a federal comprehensive tort recovery regime in the federal act suggests that state tort actions are not

This approach, moreover, makes good sense. As Honda well knows, and Congress certainly understood when it passed the Safety Act, regulatory agencies are notoriously subject to capture by those they are intended to regulate and, even in the best circumstances, move laboriously and cautiously. Given the purpose of the Safety Act (to promote auto *safety*), it was reasonable for Congress to preempt state legislative and administrative standards that are different than federal regulations, but continue to allow the common law tort system to play its traditional role of compensating injury victims, encouraging safer designs, and prompting the federal government to set higher performance standards. That is precisely the approach reflected in the Act, which expressly preserves all common law claims.

II. Petitioners' Claims Are Not Impliedly Preempted.

Bypassing Congress' *express* preservation of all common law claims, the lower court held that petitioners' claims are *impliedly* preempted because, in the court's view, they would frustrate certain policies underlying Standard 208. That ruling is wrong on two counts. First, the court should never have resorted to implied preemption analysis here. When Congress *expressly* and unequivocally states its intent to preserve all common law claims, the courts are prohibited from disregarding that clear statement and finding that Congress (or a regulatory agency) *implicitly* preempted some of them anyway. Second, even if it were permissible to resort to

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preempted); *English v. General Electric Co.*, 496 U.S. 72, 85 (1990) (state minimum wage laws, child labor laws, and tort claims would not be preempted by federal law at nuclear power plants even though they may affect resource allocation decisions and may alter radiological safety policies).

implied preemption analysis here, petitioners' claims are not impliedly preempted because they are entirely consistent with the federal government's decision to permit, but not mandate, the installation of airbags in all automobiles.

A. The Question Of Implied Preemption Cannot Be Reached Because Congress Unambiguously Preserved All Common Law Claims.

This Court has made clear that, where Congress has spoken directly and clearly on the preemption issue at stake – as it did in the Safety Act – the courts cannot search for some implied Congressional intent that differs from what Congress said. In *Cipollone*, a seven-member majority stated:

> When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation.

505 U.S. at 517 (quotations deleted). This approach, the Court said "is a variant of the familiar principle of *expressio unius est exclusio alterius*: Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted." *Id.*

The lower court nevertheless conducted an implied preemption analysis here, holding that this Court's subsequent decision in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995),

authorized its foray and "rejected" our "interpretation" of *Cipollone*. Pet. App. 13. In so doing, the lower court misread *Myrick* and *Cipollone* – and misunderstood our view of both.

In *Myrick*, this Court held that the Safety Act does not preempt a claim that a truck was defectively designed because it lacked anti-lock brakes. 514 U.S. at 286-87. Unlike in this case, there was no federal safety standard in effect in *Myrick*, so the language of the Act's preemption provision (15 U.S.C. §1392(d)), which applies only when a federal standard is "in effect," and the savings clause (15 U.S.C. §1397(k)), which applies only when there has been "compliance" with such a standard, were simply not applicable. Without deciding the effect or scope of those provisions, *see* 514 U.S. at 287 n.3, this Court held that the state common law claims at issue were neither expressly nor impliedly preempted because, at bottom, there was no federal law in place with which they could even arguably conflict. *Id.* at 286.

In the course of the decision, the Court took pains to reject a misinterpretation of *Cipollone* that had surfaced in the lower courts. The Court noted that some lower courts had read *Cipollone* to hold that "implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute." *Id.* at 287. "This argument," the Court said, "is without merit." *Id. Myrick* then re-emphasized what the Court had already said in *Cipollone* – the inclusion of an express preemption provision in a statute suggests, but does not automatically mean, that matters beyond the provision's reach are not impliedly preempted:

> The fact that an express definition of the pre-emptive reach of a statute "implies" – *i.e.* supports a reasonable inference – that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption . . . At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.

514 U.S. at 288-89.

This was the language that the lower court cited as demonstrating that resort to implied preemption here is proper and that our interpretation of *Cipollone* is wrong. Pet. App. 13. But we agree wholeheartedly with this language. Thus, if the Safety Act only contained its express preemption clause, that provision alone would not necessarily prohibit a finding of implied preemption. "At best, *Cipollone* supports an inference. . . ; it does not establish a rule." *Myrick*, 514 U.S. at 289.

The Safety Act, however, does not just contain an express preemption clause; it also contains an express and unequivocal anti-preemption clause. ***And that fact makes all of the difference.*** For when Congress has expressly said that the precise aspect of state law at issue is not preempted, the courts are not free to search farther. The courts' sole task is to ascertain the intent of Congress and, if Congress has spoken clearly (as it did in the Safety Act), the courts cannot *imply* something contrary to what Congress *expressly* said. That proposition is the core of this Court's holding in *Cipollone*: when Congress' express words provide "a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws. . .." 505 U.S. at 517. And that proposition was in no way disavowed in *Myrick*.

Cipollone, of course, did not involve statutes with express anti-preemption provisions, but that fact is of no moment; the principle is still applicable and sound. Moreover, the two cases cited in *Cipollone* for this principle *did* contain express anti-preemption provisions and, in both cases, this Court held that those provisions barred resort to implied preemption. Thus, in *Malone v. White Motor Corp.*, 435 U.S. 497, 504-05 (1978), this Court noted that implied conflict preemption may be found where "Congress does not clearly state in its legislation whether it intends to preempt state laws," but refused to consider implied conflict preemption because of the express anti-preemption provisions in the statutes at issue, saying that "the expression of congressional intent [not to preempt state law] should control the decision here." Similarly, in *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987), the Court refused to undertake an implied preemption analysis because the express anti-preemption provisions made Congress' intent not to preempt clear. *Accord id.* at 295 (Scalia, J., concurring).

By disregarding the Safety Act's express anti-preemption provision and conducting an implied preemption inquiry, the lower court violated the teachings of these cases and embarked on a journey contrary to the two basic principles of preemption analysis emphasized most recently in *Medtronic* – and the constitutional values from which they flow. First, because of the value the Constitution places on federalism, preemption analysis begins with a strong presumption against preemption. In recognition of this value, in myriad cases in myriad areas, this Court has adopted and rigorously applied "clear statement rules" to legislation that might encroach on the

states' sovereign powers within our federalist system.[13] In so doing, this Court has emphasized that Congress' power to impose its will on the states under the Supremacy Clause "is an extraordinary power in a federalist system," *Gregory*, 501 U.S. at 460, and that, to avoid disrupting the "delicate balance" of federalism, *id.*, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" state law. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). In this case, however, Congress *has* made a clear statement – *of its intent not to preempt.* To allow consideration of implied preemption here would be to turn this entire approach on its head.

Second, because of the value our Constitution places on the separation of powers, the courts' sole task in preemption analysis is to ascertain Congress' intent. In recognition of this value, this Court has repeatedly made clear that Congress' plain words must be given their meaning – whether or not the courts agree with the result.[14] To permit a court to disregard an

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[13] *See, e.g., Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*, 119 S. Ct. 2199, 2205 (1999) (Congressional abrogation of states' sovereign immunity requires "unmistakably clear" statutory language); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (Congress may not encroach on sovereign powers reserved to states by Tenth Amendment absent "plain statement" of intent to do to so); *id.* at 2401 (citing cases). *See also U.S. v. Lopez*, 514 U.S. 549, 610 (1995) (Souter, J., dissenting) (discussing clear statement rules in various contexts). *Cf. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 119 S. Ct. 2219 (1999) (state cannot be deemed to have waived its sovereign immunity absent "clear" and "unequivocal" declaration of intent to do so).

[14] *See, e.g., Brogan v. United States*, 522 U.S. 398, 408 (1998) ("[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so. . ."); *Norfolk & Western Railway Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991) ("[i]f

express anti-preemption provision as clearly worded as Section 1397(k) would contradict this fundamental tenet – and make implied preemption an open invitation to judicial activism and the displacement of state law in violation of Congress' intent.

There is one additional reason here why resort to implied preemption would be improper. In this case, faced with the unequivocal language of the Safety Act's savings clause and the uniform appellate decisions rejecting federal preemption of common law design defect claims, *see* n.2 *supra*, the federal agency involved (NHTSA) did not purport to be exercising any power to preempt any such claims. Thus, despite the extensive rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1994), and despite the intense political battle that took place over the content of Standard 208, no one – no person, no State, and no Member of Congress – received any notice that any person's right to bring state common law claims might be preempted by the agency's revised standard. And, in the 48 pages of tiny print summarizing the comments and the agency's reasons for adopting the Rule, there is not a single word suggesting that anyone ever commented on – or that the agency even considered – that possibility. *See* 49 Fed. Reg. 28962-29010.

In other words, the type of implied preemption found by the lower court here is implied preemption of state common law by federal agency *silence* on the subject – in the face of an

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the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress."); *Commissioner of Internal Revenue v. Asphalt Products Co., Inc.*, 482 U.S. 117, 121 (1987) ("Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided.").

express statutory provision prohibiting such preemption. Surely, this will not do. To begin with, given Congress' express prohibition of preemption of common law claims, NHTSA simply lacked the power to preempt such claims, even if it wanted to. *See, e.g., Lyng v. Payne,* 476 U.S. 926, 937 (1986) ("an agency's power is no greater than that delegated to it by Congress"). *Cf. Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.") Even assuming, however, that NHTSA has the power to preempt common law, its failure to say a word on the subject is further reason to foreclose any inquiry into implied conflict preemption here. This Court has previously said that "because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive." *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 714, 718 (1985). At a minimum, we should expect no less before a court may find that an agency preempted state common law claims under an authorizing statute expressly preserving those claims.

B. Even Assuming That Implied Preemption Can Be Reached Here, Petitioners' Claims Are Not Preempted Because They Do Not Conflict With Federal Law.

Even assuming, however, that implied preemption analysis is proper in this case, there is no preemption here. As *Myrick* explained, implied preemption only arises when there is an "actual conflict" between federal and state law – either

because it would be "impossible for a private party to comply" with both or because the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." 514 U.S. at 287 (citations omitted). "Impossibility" is not an issue in this case, because it is undisputed that Standard 208 would have permitted installation of an airbag in petitioners' vehicle and, in any event, would allow the payment of compensation to the Geiers. The question, then, is whether petitioners' claims somehow "stand as an obstacle" to federal purposes. The answer is no, since this lawsuit complements the goals of the Safety Act and Standard 208.

1. Petitioners' Claims Are Fully Consistent with the Safety Act.

First, there is no conflict between petitioners' claims and Congress' goals in passing the Safety Act, given that Congress made the policy judgment (as embodied in the Act's savings clause) that the preservation of all common law claims would *aid* the accomplishment and execution of its full purposes. If Congress' words mean anything, they show that Congress intended the common law tort system to exist alongside the new regulatory regime. This approach makes sense, as Congress has often relied on the combination of minimum federal regulations and common law liability to create safe and effective consumer products – while also giving victims the right to compensation for their injuries. *See supra* at 32-34. Given this fact, it can hardly be said that petitioners' claims would frustrate Congressional purposes; rather, it is a finding of preemption that would impermissibly frustrate the purposes and policies underlying the Safety Act.

The lower court nonetheless reasoned that allowing Honda to be held liable in this case would "interfere with the *method* by which Congress intended to meet its goal of

increasing automobile safety" – *i.e.*, "delegat[ing] authority to prescribe specific motor vehicle safety standards to the Secretary of Transportation. . . ." Pet. App. 14 (citations omitted; emphasis in original). Authorizing the Secretary of Transportation to prescribe motor vehicle safety standards, however, was only *one of the methods* by which Congress intended to meet its goal of increasing auto safety. *Another was preserving common law claims*. The lower court erred by finding that the former method impliedly eliminated the latter, when Congress expressly authorized both.

Honda made a similar error below, arguing that petitioners' claims would destroy the uniformity the Safety Act is supposedly meant to achieve. Uniform safety standards may be the goal of Section 1392(d), but preservation of common law claims is the goal of Section 1397(k). Congress did not intend either section to override the other. To the contrary, Congress adopted both sections – and preserved all common law claims – to achieve the sole stated purpose of the Safety Act: "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. As the New York Court of Appeals recently explained, "the uniformity argument is plainly insufficient in this case to supply the implied 'conflict' preemption 'kicker,' necessary to override the other express and controlling language of the Safety Act's preemption and savings clauses, and the legislative history." *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376, 384 (N.Y. 1998) (quotations and citations omitted).

2. Petitioners' Claims Are Fully Consistent with Standard 208.

Petitioners' claims are also fully consistent with the letter and spirit of Standard 208. When Secretary Dole promulgated Standard 208, she took the approach Congress

authorized under the Safety Act: she issued a performance standard allowing manufacturers to use the designs of their choice, but did not purport to preempt any common law claims. At the same time, she specifically found that "an airbag plus a lap and shoulder belt" was the "most effective system" (49 Fed. Reg. at 28986) and relied on three separate incentives to encourage manufacturers to utilize this system: the phase-in of the passive restraint requirement; the "extra credit" for the use of "non-belt" passive restraints (*i.e.*, airbags); and the threat of "potential liability for any deficient systems." *Id.* at 29000-01. Petitioners' attempt to hold Honda liable for failing to install an airbag (in addition to a manual lap belt and shoulder harness) in the 1987 Honda Accord is in total harmony with this approach.

The lower court nevertheless held petitioners' claims impliedly preempted on the theory that they would conflict with two goals underlying the Secretary's decision to make airbags "one of several options" available to comply with "the passive restraint requirements of Standard 208" – specifically, "allowing consumers to adjust to the new [airbag] technology" and "permitting experimentation with designs for even safer systems." Pet. App. 15 (citation omitted). This holding was erroneous for several reasons.

First, as a threshold matter, the court below failed to recognize a simple, yet dispositive, fact: *petitioners' vehicle was not subject to the passive restraint requirements of Standard 208.* As explained above, the 1984 version of Standard 208 applicable in this case contained a phase-in schedule that gave manufacturers three years to install some form of passive restraint in their vehicles. When Ms. Geier's 1987 Honda Accord was manufactured, Standard 208 required that "a minimum of 10 percent of all cars . . . must have automatic occupant crash protection." App. 8. Honda did manufacture 10 percent of its cars to meet that requirement

(with automatic seatbelts in some cars and airbags in others), but the 1987 Honda Accord was not one of those cars. Given that fact, a common law claim that *this* vehicle should have had an airbag (in addition to its manual lap belt and shoulder harness) – even if successful – could not create any conflict between state law and the federal passive restraint requirements.

Honda may nonetheless argue that petitioners' claims conflict with the federal government's decision to phase in the passive restraint requirement over a three-year period (rather than require 100% compliance all at once). Thus, for example, Honda might contend that the federal government chose a gradual phase-in in order to promote public acceptance of passive restraint technology, and that a tort verdict holding a manufacturer liable for failing to install an airbag would conflict with this goal. Any such argument would fail, however, for the simple reason that, as a factual matter, *no tort verdict could have prompted any auto maker to start installing airbags in its cars during the phase-in period.* NHTSA itself estimated that "installation of airbags in compact and larger cars would require 3 to 4 years lead-time." 49 Fed. Reg. at 28989. Consequently, even if Honda was held liable the day after the first 1987 Honda Accord was sold, the company could not change its behavior and install airbags in all of its cars until *after the conclusion of the phase-in period.* Moreover, since the crash that prompted this case did not take place until January 1992, when the phase-in period was over and Congress had already enacted legislation ordering NHTSA to require airbags in all new cars, 49 U.S.C. § 30127(b), petitioners' claims in this case could not possibly interfere with the government's decision to phase in passive restraints between 1986 and 1989. Thus, even assuming that tort verdicts have a powerful regulatory effect on manufacturers' conduct – a dubious proposition at best (*see infra* at 47-48) – under the facts of this case any claim of conflict is a chimera.

Second, the fact that the federal government made airbags one of several options that manufacturers could choose to comply with Standard 208 does not, in itself, pose any conflict with the Geiers' common law claim that Honda should have installed an airbag, in addition to a manual lap belt and shoulder harness, in the car in this case. Standard 208's options framework is simply a reflection of the Safety Act itself, which authorizes NHTSA to issue minimum *performance* standards (not mandate specific designs). *See* 15 U.S.C. § 1391(2).[15] In keeping with this statutory mandate, *all* federal standards promulgated pursuant to the Act permit design "options," some implicitly and others explicitly. Nothing in the Safety Act or its legislative history suggests that the preemptive effect of a federal standard turns on whether it implicitly or explicitly permits such choices.[16]

Moreover, to make preemption turn on whether the design option in question was explicitly mentioned in the federal standard would lead to bizarre and unjust results. If preemption took place only when the federal standard explicitly mentioned the design in question, then petitioners' claims *would not* be preempted if Standard 208 only required manual belts (and silently permitted airbags), but *would* be preempted because Standard 208 actually said that manufacturers could put in airbags, too. Under this approach, the Geiers would actually be *worse off* because NHTSA explicitly allowed Honda to use the design the Geiers say it should have used. That cannot be right. Moreover, from the manufacturers' standpoint, it is certainly "fairer" to hold Honda accountable for failing to use a design that was specifically mentioned (and called "the most effective system") by the federal government than it would be to hold Honda accountable for failing to use a design that was never mentioned by the federal government. But the "options" rationale leads to the opposite result.

Third, petitioners' claims do not conflict with Secretary Dole's goal of "allowing consumers to adjust to the new [airbag] technology." Pet. App. 15. To be clear, Secretary Dole did express concern that a federally-imposed "airbag only" rule "could lead to a backlash affecting the acceptability of airbags." 49 Fed. Reg. at 29001. This makes sense, given that the automobile industry had previously waged "the regulatory equivalent of war against the airbag," *State Farm*, 463 U.S. at 49-50, and no doubt would have made every effort to poison public opinion against a government-mandate requiring airbags in all cars. It was certainly reasonable for the agency to expect that a new regulation requiring airbags in every new vehicle across America would generate considerable corporate opposition and public controversy.

The same could not be said, however, of a judge or jury verdict holding a manufacturer liable for failing to install an airbag. To begin with, unlike a government mandate, such a common law verdict would not force a manufacturer to change its conduct in any way – let alone to install airbags in its entire fleet of vehicles. Rather, all the imposition of liability would require is that the manufacturer compensate its victim for his or

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[15] Indeed, Secretary Dole noted that "several commenters questioned the Department's authority to issue an airbag only standard, claiming it would be a 'design' standard," and repeatedly emphasized that she was issuing a "performance standard," extolling the advantages of that approach over issuing a federal mandate imposing even the best design. 49 Fed. Reg. at 29001. *See also id.* at 28996, 28997.

[16] Standard 208 is not unique in explicitly providing optional means of compliance. *See, e.g.*, Standard 125 (warning devices); Standard 202 (head restraints); Standard 217 (bus emergency exits and window retention and release). 49 C.F.R. §§ 571.101 *et seq.* (1998). Thus, if the "options" argument is right, then at least some common law claims would be barred in regard to each of these matters.

her injuries. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. at 185-86.[17] Even assuming, however, that a manufacturer decided to change its conduct and install airbags to avoid further liability, it would undoubtedly make every effort to *promote* the safety of the new systems, in order to sell more cars. This is precisely the opposite of what Secretary Dole feared the auto makers would do in response to a government-mandated airbag requirement – *i.e.*, launch another war against NHTSA by claiming that airbags are unsafe. Thus, unlike a government regulation requiring airbags in all cars, a jury finding that a manufacturer was negligent for failing to install an airbag would actually help educate the public about the benefits of the technology, thereby *promoting* public acceptability of airbags – which is exactly what the agency wanted in the first place.[18]

Fourth, for similar reasons, petitioners' claims do not conflict with NHTSA's interest in "permitting experimentation with designs for even safer systems." Pet. App. 15. While a federal "airbags only" mandate would *outlaw* such

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[17] Indeed, the first "no-airbag" recovery took place in 1984, when Ford Motor Company paid $1.8 million to settle a claim that a Pinto was defectively designed because it lacked an airbag. *See Burgess v. Ford Motor Co.*, No. DV79-355 (Ala. Cir. Ct. 1984). Yet the auto makers continued to make cars without airbags for another decade, until Congress finally passed a law mandating airbags in all vehicles. *See* 49 U.S.C. § 30127(b).

[18] There are other reasons that common law claims would not conflict with NHTSA's goal of allowing consumers to adjust to airbag technology. To begin with, no manufacturer would decide to install airbags in response to common law claims unless it was convinced the public would accept them. In addition, any manufacturer that chose to install airbags in response to common law verdicts would have several years to promote their acceptance. *See* 49 Fed. Reg. at 28989 (estimating that "installation of airbags in compact and larger cars would require 3 to 4 years lead-time").

experimentation, the prosecution of common law claims would *encourage* such experimentation by spurring the manufacturers to avoid unduly dangerous designs and seek out especially safe ones. As Secretary Dole recognized, common law claims create an incentive for design innovation and the development of safer systems because the manufacturers understand that, if they do not utilize an available safer system, they could be held liable for the injuries that result. *See* 49 Fed. Reg. at 49000.

The argument that tort liability stifles innovation is also belied by the auto manufacturers' own arguments in the 1984 rulemaking. According to Secretary Dole, the auto industry persistently complained that "the presence of the government in the middle of the debate over passive restraints has distorted the activities of both automobile manufacturers and insurance companies." 49 Fed. Reg. at 29003. "If the marketplace had been allowed to work," the industry argued, "insurance incentives would have led to the voluntary adoption of one or more systems by the manufacturers." *Id.* Thus, in the manufacturers' opinion, an unregulated environment is the most fertile ground for growth and adoption of diverse technology. Any such environment, however, would necessarily *include the potential imposition of tort liability for defective designs*, since the Safety Act's preemption clause only applies where there is a "Federal motor vehicle safety standard in effect." 15 U.S.C. § 1392(d). Thus, absent government regulation, there would be no preemption of *any* form of state law. Clearly, then, the auto manufacturers understand that the common law can and does readily coexist with innovation and technological diversity.

In short, *all* of the safety goals that Secretary Dole feared would be endangered by an "airbag only" government design mandate are furthered by common law claims. Thus, it is not surprising that Standard 208 is devoid of any reference whatsoever to an administrative intent to preempt common law

claims. This silence speaks volumes, given that the agency was clearly aware of the potential for ongoing litigation involving airbags. Especially in light of the powerful presumption against preemption – a presumption designed to protect the states' historic right to provide compensation for their citizens through the tort system – it would be perverse to conclude that, without saying a word on the matter, NHTSA implicitly contravened Congress' explicit command and wiped out all common law claims involving airbags, leaving victims like Ms. Geier with no remedy at all for their injuries.

CONCLUSION

The lower court's decision finding preemption of petitioners' claims should be reversed.

Respectfully submitted,

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STATUTORY AND REGULATORY APPENDIX

The National Traffic and Motor Vehicle Safety Act of 1966, as codified when the vehicle at issue in this case was manufactured, provided in pertinent part:

> **15 U.S.C. § 1392(d). Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or state governments.** Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * * *

15 U.S.C. § 1397(k). Continuation of common law liability. Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

On July 5, 1994, Congress recodified the Act "without substantive change" (Pub. L. No. 103-272, 108 Stat. 745, 941). The new Code provisions, in relevant part, are as follows:

49 U.S.C. § 30103. Relationship to other laws.

(b) Preemption. (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

* * * *

(e) Common Law Liability. Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

All of the applicable preemption cases, including the decisions by the two courts below, discuss the provisions as codified before the 1994 recodification. This brief, therefore, uses the citations employed in those decisions.

B. Regulatory Provisions.

Federal Motor Vehicle Safety Standard 208, as codified when the vehicle at issue in this case was manufactured (*see* 49 C.F.R. § 571.208 (October 1986)),[1] provided in pertinent part:

§ 571.208 Standard No. 208; Occupant crash protection.

* * *

S1. Scope. This standard specifies performance requirements for the protection of vehicle occupants in crashes.

S2. Purpose. The purpose of this standard is to reduce the number of deaths of vehicle occupants, and the severity of

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[1] This version of the rule applies to vehicles manufactured during model year 1987. It includes the amendments promulgated by the agency in 1984, *see* 49 Fed. Reg. 28962 (July 17, 1984), and various clarifying amendments that did not affect the substance of the 1984 rule. *See* 50 Fed. Reg. 35237 (Aug. 30, 1985) (clarifying "extra-credit" provision for vehicles meeting the passive restraint requirement by means other than any type of seatbelt); 51 Fed. Reg. 9810 (March 21, 1986) (clarifying method for calculating compliance with phase-in percentages); 51 Fed. Reg. 31771 (Sept. 5, 1986) (correcting typographical error in clarified method for calculating compliance with phase-in percentages published at 51 Fed. Reg. 9810).

injuries, by specifying vehicle crashworthiness requirements in terms of forces and accelerations measured on anthropomorphic dummies in test crashes and by specifying equipment requirements for active and passive restraint systems.

S3. Application. This standard applies to passenger cars, multipurpose passenger vehicles, trucks, and buses. In addition, *S9., Pressure vessels and explosive devices,* applies to vessels designed to contain a pressurized fluid or gas, and to explosive devices, for use in the above types of motor vehicles as part of a system designed to provide protection to occupants in the event of a crash.

S4. General requirements.

S.4.1. Passenger cars.

* * *

S.4.1.2 Passenger cars manufactured on or after September 1, 1973, and before September 1, 1986. Each passenger car manufactured on or after September 1, 1973, and before September 1, 1986, shall meet the requirements of *S4.1.2.1, S4.1.2.2* or *S4.1.2.3.* A protection system that meets the requirements of *S4.1.2.1* or *S4.1.2.2* may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of *S4.1.2.3.*

S4.1.2.1 First option - frontal/angular automatic protection system. The vehicle shall:

(a) At each front outboard designated seating position meet the frontal crash protection requirements of *S5.1* [governing *Occupant Crash Protection Requirements, front impact*] by means that require no action by vehicle occupants;

(b) At the front center designated seating position and at each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 [governing *Seat Belt Assemblies*] and to *S7.1* [governing *Seat Belt Assembly, Adjustment*] and *S7.2* [governing *Seat Belt Assembly, Latch Mechanism*]; and

(c) *Either.* (1) Meet the lateral crash protection requirements of *S5.2* [governing *Occupant Crash Protection Requirements, side impact*] and the rollover crash protection requirements of *S5.3* [governing *Occupant Crash Protection Requirements, rollover impact*] by means that require no action by vehicle occupants; or

(2) At each front outboard designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 [governing *Seat Belt Assemblies*] and *S7.1* through *S7.3* [governing *Seat Belt Asembly, Adjustment, Latch Mechanism* and *warning system*], and that meets the requirements of *S5.1* [governing *Occupant Crash Protection Requirements, front impact*] with front test dummies as required by *S5.1* [governing *Occupant Crash Protection Requirements, front impact*], restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 Second option - head-on automatic protection system. The vehicle shall –

(a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to *S7.1* [governing *Seat Belt Assembly, Adjustment*] and *S7.2*

[governing *Seat Belt Assembly, Latch Mechanism*] of this standard.

(b) At each front outboard designated seating position, meet the frontal crash protection requirements of *S5.1* [governing *Occupant Crash Protection Requirements, front impact*], in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front outboard designated seating position, meet the frontal crash protection requirements of *S5.1* [governing *Occupant Crash Protection Requirements, front impact*], in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and

(d) At each front outboard designated seating position, have a seat belt warning system that conforms to *S7.3* [governing *Seat Belt Assembly, warning system*].

S4.1.2.3 Third option - lap and shoulder belt protection system with belt warning.

S.4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall –

(a) At each front outboard designated seating position have a seat belt assembly that conforms to *S7.1* [governing *Seat Belt Assembly, Adjustment*] and *S7.2* [governing *Seat Belt Assembly, Latch Mechanism*] of this standard, and a seat belt warning system that conforms to *S7.3* [governing *Seat Belt Assembly, warning system*]. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209) [governing *Seat Belt Assemblies*], or a Type 1 seat belt assembly such that with a test device restrained by the

assembly the vehicle meets the frontal crash protection requirements of *S5.1* [governing *Occupant Crash Protection Requirements, front impact*] in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) [governing *Seat Belt Assemblies*] and to *S7.1* [governing *Seat Belt Assembly, Adjustment*] and *S7.2* [governing *Seat Belt Assembly, Latch Mechanism*] of this standard, and a seat belt warning system that conforms to *S7.3* [governing *Seat Belt Assembly, warning system*]; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) [governing *Seat Belt Assemblies*] and *S7.1* [governing *Seat Belt Assembly, Adjustment*] and *S7.2* [governing *Seat Belt Assembly, Latch Mechanism*] of this standard.

S4.1.2.3. Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) [governing *Seat Belt Assemblies*] and to *S7.1* [governing *Seat Belt Assembly, Adjustment*] and *S7.2* [governing *Seat Belt Assembly, Latch Mechanism*] of this standard, and at each front designated seating position have a seat belt warning system that conforms to *S7.3* [governing *Seat Belt Assembly, warning system*].

S4.1.3 Passenger cars manufactured on or after September 1, 1986, and before September 1, 1989.

S4.1.3.1 Passenger cars manufactured on or after September 1, 1986, and before September 1, 1987.

S4.1.3.1.1 Subject to *S4.1.3.1.2* and *S4.1.3.4,* each passenger car manufactured on or after September 1, 1986, and before September 1, 1987, shall comply with the requirements of *S4.1.2.1, S4.1.2.2* or *S4.1.2.3.* A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.1.2 Subject to *S4.1.3.4* and *S4.1.5,* the amount of passenger cars, specified in *S4.1.3.1.1* complying with the requirements of *S4.1.2.1* shall be not less than 10 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1,1983, and before September 1, 1986, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in *S4.1.3.1.1.*

S4.1.3.2 Passenger cars manufactured on or after September 1, 1987, and before September 1, 1988.

S4.1.3.2.1 Subject to *S4.1.3.2.2* and *S.4.1.3.4,* each passenger car manufactured on or after September 1, 1987, and before September 1, 1988, shall comply with the requirements of *S4.1.2.1, S4.1.2.2* or *S4.1.2.3.* A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.2.2 Subject to *S4.1.3.4* and *S.4.1.5,* the amount of passenger cars specified in *S4.1.3.2.1* complying

with the requirements of *S4.1.2.1* shall be not less than 25 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1984, and before September 1, 1987, by each manufacturer, or

(b) The manufacturer's annual production of passenger cars during the period specified in *S4.1.3.2.1.*

S4.1.3.3 Passenger cars manufactured on or after September 1, 1988, and before September 1, 1989.

S4.1.3.3.1 Subject to *S4.1.3.3.2* and *S4.1.3.4,* each passenger car manufactured on or after September 1, 1988, and before September 1, 1989, shall comply with the requirements of *S4.1.2.1, S4.1.2.2* or *S4.1.2.3.* A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.3.3.2 Subject to *S4.1.3.4* and *S4.1.5,* the amount of passenger cars specified in *S4.1.3.3.1* complying with the requirements of *S4.1.2.1* shall be not less than 40 percent of:

(a) The average annual production of passenger cars manufactured on or after September 1, 1985, and before September 1, 1988, by each manufacturer; or

(b) The manufacturer's annual production of passenger cars during the period specified in *S4.1.3.3.1.*

S4.1.3.4 Calculation of complying passenger

cars.

(a) For the purposes of calculating the numbers of cars manufactured under *S4.1.3.1.2, S4.1.3.2.2,* or *S4.1.3.3.2* to comply with *S4.1.2.1*:

(1) Each car whose driver's seating position complies with the requirements of *S4.1.2.1(a)* by means not including any type of seat belt and whose front right seating position will comply with the requirements of *S4.1.2.1(a)* by any means is counted as 1.5 vehicles, and

(2) Each car whose driver's seating position complies with the requirements of *S4.1.2.1(a)* by means not including any type of seat belt and whose front right seat seating position is equipped with a manual Type 2 seat belt is counted as one vehicle.

(b) For the purposes of complying with *S4.1.3.1.2,* a passenger car may be counted if it:

(1) Is manufactured on or after September 1, 1985, but before September 1, 1986, and

(2) Complies with *S4.1.2.1.*

(c) For the purposes of complying with *S4.1.3.2.2,* a passenger car may be counted if it:

(1) Is manufactured on or after September 1, 1985, but before September 1, 1987.

(2) Complies with *S4.1.2.1,* and

(3) Is not counted toward compliance with

S4.1.3.1.2.

(d) For the purposes of complying with *S4.1.3.3.2,* a passenger car may be counted if it:

(1) Is manufactured on or after September 1, 1985, but before September 1, 1988,

(2) Complies with *S4.1.2.1;* and

(3) Is not counted toward compliance with *S4.1.3.1.2* or *S4.1.3.2.2.*

S4.1.3.5 Passenger cars produced by more than one manufacturer.

S4.1.3.5.1 For the purposes of calculating average annual production of passenger cars for each manufacturer and the amount of passenger cars manufactured by each manufacturer under *S4.1.3.1.2, S4.1.3.2.2* or *S4.1.3.3.2,* a passenger car produced by more than one manufacturer shall be attributed to a single manufacturer as follows, subject to *S4.1.3.5.2:*

(a) A passenger car which is imported shall be attributed to the importer.

(b) A passenger car manufactured in the United States by more than one manufacturer, one of which also markets the vehicle, shall be attributed to the manufacturer which markets the vehicle.

S4.1.3.5. A passenger car produced by more than one manufacturer shall be attributed to any one of the vehicle's manufacturers specified by an express written

contract, reported to the National Highway Traffic Safety Administration under 49 CFR Part 585, between the manufacturer so specified and the manufacturer to which the vehicle would otherwise be attributed under *S4.1.3.5.1.*

S4.1.4 Passenger cars manufactured on or after September 1, 1989. Except as provided in *S4.1.5,* each passenger car manufactured on or after September 1, 1989, shall comply with the requirements of *S4.1.2.1.* A vehicle shall not be deemed to be in noncompliance with this standard if its manufacturer establishes that it did not have reason to know in the exercise of due care that such vehicle is not in conformity with the requirement of this standard.

S4.1.5 Mandatory seatbelt use laws.

S4.1.5.1 If the Secretary of Transportation determines, by not later than April 1, 1989, that state mandatory safety belt usage laws have been enacted that meet the criteria specified in *S4.1.5.2* and that are applicable to not less than two-thirds of the total population of the 50 states and the District of Columbia (based on the most recent Estimates of the Resident Population of States, by Age, Current Population Reports, Series P-25, Bureau of the Census), each passenger car manufactured under *S4.1.3* or *S4.1.4* on or after the date of that determination shall comply with the requirements of *S4.1.2.1, S4.1.2.2* or *S4.1.2.3.*

S4.1.5.2 The minimum criteria for state mandatory safety belt usage laws are:

(a) Require that each front seat occupant of a passenger car equipped with safety belts under Standard No. 208 has a safety belt properly fastened about his or her body at all times when the vehicle is in forward motion,

(b) If waivers from the safety belt usage requirement are to be provided, permit them for medical reasons only.

(c) Provide for the following enforcement measures:

(1) A penalty of not less than $25.00 (which may include court costs) for each occupant of a car who violates the belt usage requirement.

(2) A provision specifying that the violation of the belt usage requirement may be used to mitigate damages with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. This requirement is satisfied if there is a rule of law in the State permitting such mitigation.

(3) A program to encourage compliance with the belt usage requirement.

(d) An effective date of not later than September 1, 1989.

* * *

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No. 98-1811

IN THE
Supreme Court of the United States

ALEXIS GEIER, *et al.*,
Petitioners,

v.

AMERICAN HONDA MOTOR CO., INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act of 1966 and Federal Motor Vehicle Safety Standard 208 preempt, either expressly or impliedly by conflict, a common-law tort claim that an automobile manufactured in the 1987 model year was defectively designed because it was equipped with seat belts and without airbags.

RULE 29.6 STATEMENT

Pursuant to S. Ct. Rule 29.6, Respondents American Honda Motor Co., Inc. and Honda of America Mfg., Inc. refer to and incorporate by reference the list of their non-wholly owned subsidiaries submitted with their Respondents' Brief in Opposition to Petition for Writ of Certiorari (at ii-iv) in this case.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves several provisions of the National Traffic and Motor Vehicle Safety Act of 1966 ("the Safety Act"), 15 U.S.C. §§ 1381 *et seq.*, recodified "without substantive change" at 49 U.S.C. §§ 30101 *et seq.* Relevant sections, as they appear in each version, are set out in the appendix to this brief. Like the court of appeals and Petitioners, we generally refer to and cite the pre-recodification version of each section.

STATEMENT

A. The Safety Act

In 1966, Congress enacted the Safety Act, requiring the Secretary of Transportation to establish federal motor ve-

hicle safety standards ("FMVSS's") that "meet the need for motor vehicle safety." 15 U.S.C. § 1392(a). Each FMVSS must "protect[] against unreasonable risk of death or injury." 15 U.S.C. § 1391(1).

To ensure that the Secretary's determination that an FMVSS should govern a particular aspect of motor vehicle performance would not be undermined by a hodgepodge of state standards based on different judgments about how best to prevent unreasonable risks with respect to that particular aspect of performance, Congress provided that no State "shall have *any* authority either to establish, or continue in effect, . . . *any* safety standard" that addresses the same aspect and is not "identical to" the FMVSS. 15 U.S.C. § 1392(d) (emphasis added). Explaining the need for this preemption provision, the House Report stated:

> [T]his preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966). Similarly, the Senate Report stated:

> The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country.

S. Rep. No. 1301, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720.

The same section also contains two limiting saving clauses, or anti-preemption provisions. One provides that "[n]othing in this section shall be construed as preventing any State from enforcing any safety standard which is

identical to" an FMVSS. 15 U.S.C. § 1392(d). The other provides that "[n]othing in this section shall be construed to prevent" any governmental entity from imposing higher standards of performance for vehicles purchased for its own use. *Ibid.*

Elsewhere in the Act, Congress included a section addressing the effect to be given to proof of compliance with an FMVSS in common-law actions. It states, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). The legislative history of this section, consistent with the "compliance with" language itself, discusses the admissibility and weight of evidence of compliance with FMVSS's, not preemption. *See* pp. 27-28, *infra.*

B. Federal Motor Vehicle Safety Standard 208

In 1967 the Secretary promulgated FMVSS 208, requiring the installation of seat belts in automobiles sold in this country. 32 Fed. Reg. 2408, 2415 (1967). In 1969, because many occupants chose not to use their seat belts, the Secretary began to consider amending FMVSS 208 to require "passive" occupant-restraint systems—systems that restrain occupants automatically in crashes. 34 Fed. Reg. 11148 (1969). The systems considered included automatic seat belts, "deployable nets," airbags, and "energy-absorbing materials." 35 Fed. Reg. 7187 (1970). During the course of the ensuing 15 years, the Secretary conducted more than 2,000 crash tests and sled tests of vehicles equipped with airbags and other passive restraints, held numerous public hearings, published dozens of Notices of Proposed Rulemaking, considered thousands of pages of data and other material submitted by airbag manufacturers, seat-belt manufacturers, researchers in aca-

demia, vehicle manufacturers, consumers, insurance organizations, physicians, and others, and amended FMVSS 208 several times. *See, e.g., Pacific Legal Found. v. DOT*, 593 F.2d 1338, 1344 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979); 42 Fed. Reg. 5071 (1977); 46 Fed. Reg. 53419 (1981).

In 1983 this Court held that the Secretary's rescission of the most recent passive-restraint requirement had not been adequately explained, and remanded for reconsideration. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). On remand, Secretary Elizabeth Dole conducted a "thorough review of the issue of automobile occupant protection, including the long regulatory history [and] extensive studies, analyses, and data on the subject," 49 Fed. Reg. 28962 (1984), and promulgated the version of FMVSS 208 that was in effect when the 1987 Honda Accord was manufactured and sold.

In amending FMVSS 208, Secretary Dole explicitly considered and rejected an airbag requirement. *Id.* at 29000-02. Instead, she required vehicle manufacturers to phase in passive restraints beginning with at least 10 percent of their 1987 model-year ("MY") vehicles and reaching 100 percent with their 1990 MY vehicles. *Id.* at 28963. She explicitly authorized manufacturers to install manual lap-shoulder seat belts, and encouraged them to provide a variety of belt and non-belt occupant-restraint systems, throughout the phase-in period. *Id.* at 28997, 29000-02, 29008-10.

The Secretary also identified the several federal safety policies and purposes that underlay her decision. First, the then-available field data regarding the effectiveness of airbags relative to the effectiveness of seat belts not only were inadequate, but showed that airbags had provided *no* increased safety over seat belts as used. *Id.* at 28985.

Accordingly, rejection of an airbag requirement was necessary because "[w]idespread use of both [airbag systems and belt systems] is the only way to develop definitive data" as to their relative effectiveness. *Id.* at 29000, 29001. Rejection of an airbag requirement also was necessary to avoid impeding safety by "stifl[ing] innovation in occupant-protection systems" and "killing or seriously retarding the development of more effective . . . occupant protection systems." *Id.* at 29001.

The Secretary further noted that airbags continued to present unique safety dangers. She stated that the "lack of experience" regarding out-of-position occupants in some circumstances, "as well as the lack of experience for some companies in any form of airbag development, make the Department reluctant to mandate across-the-board airbags." *Id.* at 29001. She cautioned that "the Department can not state for certain that airbags will never cause injury or death to a child." *Id.* at 28992. She expressed concern that airbags might indirectly cause injuries and deaths because they might not be replaced after they deployed, which would leave occupants unprotected in subsequent collisions. *Id.* at 29001. And she expressed concern that, just as many consumers had disconnected the ignition interlocks that required seat belts to be buckled in order to start 1974 MY vehicles, consumers fearful about airbag dangers would disconnect their airbags and leave themselves unprotected. *Id.* at 29001.

Still further, the determination that airbags should not be required in 1987 was vital to the Secretary's goal of achieving increased safety as quickly as possible by giving the States an incentive to enact laws requiring vehicle occupants to use their seat belts. *Id.* at 28985-86, 28991, 29001, 29003. The Secretary emphasized that "[e]ffectively enforced seatbelt use laws . . . will provide the

greatest safety benefits most quickly of any of the alternatives. . . ." *Id.* at 28962.

C. This Case

On January 12, 1992, Alexis Geier drove a 1987 Honda Accord off the road and into a tree. J.A. 2. She and her parents sued Honda, seeking $10,500,000 in compensatory damages and $10,000,000 in punitive damages, *e.g.*, J.A. 5-10, and alleging that injuries she had incurred in the crash had resulted from, among other things, the "absence of airbags." *E.g.*, J.A. 24.

After Petitioners dismissed all but their "no-airbag" claims, the district court, following the Ninth Circuit's decision in *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997), held those claims expressly preempted and granted Honda's summary judgment motion. Pet. App. 17-20. The court of appeals affirmed. Pet. App. 1-16.

The court of appeals identified several reasons why the Secretary had determined that an airbag requirement would disserve federal safety policies and purposes. It also noted "the success of the Secretary's decision on how to implement the Act" with respect to the airbag issue. Pet. App. 15. The court then concluded that it "need not resolve whether Geier's claim is expressly preempted" because, as four other courts of appeals had held in no-airbag cases,[1] such claims "stand as an obstacle to

[1] *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 519 U.S. 814 (1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert denied*, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990).

the federal government's chosen method of achieving the Act's safety objectives." Accordingly, the court held Petitioners' claims impliedly preempted by that conflict. Pet. App. 12.

SUMMARY OF ARGUMENT

The Safety Act and FMVSS 208 preempt Petitioners' no-airbag claims. The common-law standard asserted by Petitioners threatens massive, repeated tort liability for having installed seat belts, and not airbags, in 1987 MY vehicles. In promulgating FMVSS 208, however, the Secretary determined that requiring airbags in 1987 MY vehicles would conflict with explicitly identified federal motor vehicle safety policies and purposes. To promote those policies and purposes, she expressly considered and rejected an airbag requirement, and authorized the installation of *either* seat belts *or* airbags in automobiles made in that year and for several years thereafter. As the court of appeals below held, and as the Secretary has long maintained, Petitioners' no-airbag claims conflict with FMVSS 208 and the Safety Act and are for that reason impliedly preempted.

In addition, although the court of appeals found it unnecessary to decide the issue, the Safety Act's preemption provision, 15 U.S.C. § 1392(d), expressly preempts Petitioners' no-airbag claims. It provides that no State shall have "any" authority to establish "any" safety standard different from an on-point FMVSS. FMVSS 208 was and is on-point, and Petitioners' no-airbag claims differ markedly from it by asserting a common-law standard requiring the installation of airbags in 1987 MY vehicles.

Section 1397(k) of the Safety Act does not prevent the narrow preemption, both express and implied, that governs here. Rather, the text, structure, and legislative history of the Act show that section 1397(k) does not

address this type of preemption at all, but instead has the quite different purpose of protecting common-law actions from a federally-created merits defense of compliance with safety regulations. Petitioners' argument to the contrary literally ignores the words "Compliance with" with which section 1397(k) begins.

Petitioners' contention that section 1397(k) precludes preemption of *any* common-law standard, no matter how violent the conflict between the common-law standard and an on-point FMVSS, also conflicts sharply with a series of decisions by this Court spanning the 20th Century. Those decisions hold that even broad anti-preemption provisions—those providing that "nothing" in the federal statute "shall in any way abridge or alter" either common-law *or* statutory remedies under state law—must be construed to prevent only field preemption, not preemption of common-law standards that conflict with federal regulations. Since the language of section 1397(k) is considerably narrower than the language of those provisions, it cannot properly be construed to limit preemption more broadly.

Petitioners' argument also attributes to Congress an intent so remarkable that it is without precedent in this Court's decisions. Under Petitioners' view, even when a federal standard *requires* manufacturers to install specific equipment, any plaintiff may bring a common-law claim against a manufacturer for having installed that very item of equipment. Yet if the same plaintiff were to sue the same manufacturer, but under a state safety statute, for having installed the same item of equipment, the claim would be preempted. It would be extraordinary to conclude that Congress intended a system both so inconsistent and so harmful to expressly articulated federal safety policies.

ARGUMENT

I. PETITIONERS' NO-AIRBAG CLAIMS ARE EXPRESSLY PREEMPTED [2]

State law is expressly preempted when "Congress' command is explicitly stated in the statute's language." *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990). When an express preemption provision exists, a determination of its scope "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Id.* at 57. Here, the Safety Act contains an express preemption provision, and its language plainly encompasses Petitioners' no-airbag claims.

A. Section 1392(d) Preempts a Common-Law Standard Where, as Here, the Common-Law Standard Addresses the Same Aspect of Performance as a Federal Motor Vehicle Safety Standard, but Is Not Identical to It

When the Secretary of Transportation has determined that an FMVSS should govern a particular aspect of motor vehicle performance, the Safety Act expressly preempts "any" state safety standard that differs from the FMVSS and applies to the same aspect of performance. The first sentence of 15 U.S.C. § 1392(d) provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have *any* authority either to establish, or to continue in effect, with respect to *any* motor vehicle or item of motor vehicle equipment *any* safety standard appli-

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[2] Although the court of appeals held their claims impliedly preempted and did not rule on express preemption, Petitioners first address express preemption under section 1392(d), then section 1397(k), and finally implied preemption. So do we.

> cable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. (Emphasis added.)

When Honda manufactured and sold the 1987 Accord, the Secretary had established an FMVSS governing the precise aspect of vehicle performance—restraining occupants either by seat belts or by airbags in crashes—with respect to which Petitioners seek to establish a common-law standard. FMVSS 208 not only authorized, but explicitly encouraged, manufacturers to offer consumers a variety of occupant-restraint systems—including manual seat belts, automatic seat belts, airbags, and passive interiors—in 1987 MY vehicles. Petitioners seek to enforce a markedly different standard, one that would subject manufacturers to repeated, massive liability for having produced 1987 MY vehicles without airbags. Because that standard differs from the on-point FMVSS, Petitioners' claims are expressly preempted.

1. *The Plain Language of Section 1392(d), as Well as Recent Decisions by This Court, Makes Clear That This Provision Encompasses Common-Law* Standards

Congress made clear that section 1392(d) was to encompass all categories of state safety standards by declaring that no State "shall have *any* authority either to establish, or to continue in effect, . . . *any* safety standard" not identical to an on-point FMVSS.[3] (Emphasis added.) That language encompasses common-law standards because States establish common-law standards through their courts, just as they establish legislative and administrative standards through their legislatures and administrative

[3] While asking the Court to give full scope to the word "any" as used in section 1397(k), *e.g.*, Pet. Br. at 25-26, Petitioners ignore the same word's repeated use in the preemption provision.

agencies. *See, e.g., Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (quoting California Supreme Court's description of product-liability actions as ensuring compliance "with the state's safety standards"); *International Paper Co v. Ouellette*, 479 U.S. 481, 493, 495 (1987) (common-law claim preempted because it would allow "affected States . . . to impose separate discharge standards"); *id.* at 496 (common-law actions preempted because they would subject defendants "to a variety of common-law rules established by the different States. . . . These nuisance standards often are 'vague' and 'indeterminate.'"); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (framing preemption question as "whether the imposition of a state standard in a damages action" under common law "would frustrate the objectives of the federal law"); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965) ("common law standards"); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("stricter negligence standards of common law"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring in part and concurring in the judgment) (state tort suits can "set state standards").

Petitioners argue that section 1392(d) should be interpreted to apply only to legislative and administrative standards because it does not explicitly say "common-law standards." Pet. Br. at 19. But it does not explicitly say "administrative standards" or "legislative standards," either. There is no basis to assume that Congress intended the usually encompassing word "standard" to mean only two of the common subcategories, but not the third.

Section 1392(d) identifies the Secretary's *preemptive* administrative standards by the statutorily-defined term "motor vehicle safety standards." 15 U.S.C. § 1391(2).

In contrast, section 1392(d) identifies the type of state law *subject to preemption* by the broader term "any safety standard." Thus, by declaring that when the Secretary has established an on-point "motor vehicle safety standard," the States may not establish "any safety standard" that differs from it, Congress showed that "safety standard" means more than administrative standards. *Cf. Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986) ("principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ").[4]

This Court's decisions indicate that when Congress has prescribed the scope of preemption with a single broad term, rather than a catalogue of categories commonly subsumed by that term, the term should be construed to encompass those categories, including common-law claims. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521, 523 (1992) (" '[n]o requirement or prohibi-

4 Petitioners argue that "safety standard" in section 1392(d) means only "administrative standards" because "Congress used the same term in the same provision" to identify both "the type of federal law that is to be accorded preemptive effect" and "the type of state law that is subject to preemption." Pet. Br. at 20. That argument ignores the statute's careful distinction, discussed in text above, between the Secretary's *preempting* "motor vehicle safety standards" and state "safety standards" *subject to preemption*. It also contradicts Petitioners' earlier argument that "safety standard" includes *both* administrative *and* legislative standards. Pet. Br. at 14, 21, 23.

Petitioners repeat the mistake in contending that Congress used the term "safety standard" "throughout the Act to refer to the administrative standards" promulgated by the Secretary, Pet. Br. at 20 n.8. Actually, each provision they cite uses the narrow, defined term "motor vehicle safety standard" to refer to the Secretary's administrative standards. 15 U.S.C. §§ 1392(e), 1392(h), 1392(i)(1)(A), 1392(i)(1)(B)). The Solicitor General offers a similar misinterpretation. *See* Br. for the United States at 12-13 (citing 15 U.S.C. § 1392(a)).

tion' . . . easily encompass[es] obligations that take the form of common law rules"); *Medtronic*, 518 U.S. at 509-11 (opinion concurring in part and dissenting in part) ("requirements" encompasses common-law tort claims); *id.* at 503-04 (concurring opinion) (same); *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991) ("all other law" encompasses "common-law rules of liability").

Had it intended "standards" to have something less than this ordinary meaning and to refer only to statutes and regulations, Congress could have explicitly limited the scope of section 1392(d) to "statutes and regulations."[5] It did not do so, and its choice of the broader term dictates that the term be given its usual, broader scope. As stated in *Cipollone*, 505 U.S. at 523:

> [W]hile the version of the 1969 Act passed by the Senate pre-empted 'any State *statute or regulation* with respect to advertising or promotion' . . ., the Conference Committee replaced this language with 'State *law* with respect to . . . advertising or promotion.' In such a situation, § 5(b)'s pre-emption of 'State law' cannot fairly be limited to positive enactments. (Emphasis in original).

This conclusion is further confirmed by what the Court in *Cipollone* referred to as "the familiar principle of *expressio unius est exclusio alterius*." *Id.* at 517. When the Secretary has established an FMVSS governing a particular aspect of vehicle performance, the first sentence of section 1392(d) prohibits the States from establishing "any safety standard applicable to the same aspect of performance" unless the state standard is "identical to the

5 When Congress meant "regulations" in the Act, it said "regulations." *E.g.*, 15 U.S.C. §§ 1392(g), 1398(a).

Federal standard." Two saving clauses in the same section specify the only exceptions. One allows States to enforce state standards "identical to" applicable FMVSS's. The other allows governments to establish, for vehicles procured for their own use, standards "higher than" applicable FMVSS's.

These two saving clauses in the preemption provision show that Congress well knew how to carve out exceptions in that provision. Because no other exception appears there, the principle of *expressio unius est exclusio alterius* establishes that there is none.

Thus, the text of section 1392(d) shows that it applies equally to legislative, administrative, and common-law standards. Just as a state statute or regulation requiring manufacturers to install airbags in 1987 MY vehicles would be preempted by FMVSS 208, so are Petitioners' no-airbag claims.

2. *Petitioners' Attempts to Avoid This Result Do Not Withstand Scrutiny*

Petitioners try to avoid this result by advancing a miscellany of arguments. Pet. Br. at 20-24. None withstands scrutiny.

For example, Petitioners argue that section 1392(d) cannot preempt common-law standards because it preempts standards "*with respect to* any motor vehicle," and common-law standards are general, rather than applying specifically "with respect to" motor vehicles. Pet. Br. at 21. That argument contradicts this Court's decisions in *Cipollone* and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

The preemption provision in *Cipollone* prohibited the States from imposing any requirement or prohibition "*with*

respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." (Emphasis added.) The Court held preempted all common-law failure-to-warn claims based on allegations that the defendants' advertising or promotions should have included warnings in addition to those required by federal law. 505 U.S. at 514, 524. *Cipollone* thus makes clear that a preemption provision's use of "with respect to" readily encompasses general common-law standards that, when specifically applied, impose liability for conduct governed by an on-point federal regulation.

Similarly, the plaintiff in *Morales* "advance[d] the notion that only state laws specifically addressed to the airline industry are pre-empted, whereas the [federal statute] imposes no constraints on laws of general applicability." 504 U.S. at 386. The Court rejected the argument as "creating an utterly irrational loophole" and stated, "[T]here is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute. . . . " *Id.* Accordingly, here, as in *Cipollone* and *Morales*, "pre-emption of 'state law' cannot fairly be limited to positive enactments." *Cipollone*, 505 U.S. at 523.

Petitioners also argue that section 1392(d) cannot encompass common-law standards because the safety standards referred to in section 1392(d) "concern an 'aspect of performance'," whereas a common-law standard focuses on the design of the vehicle's equipment. Pet. Br. at 21-22. This fails to recognize that the Secretary can, and often does, establish performance standards by imposing equipment requirements and leaving numerous choices of equipment design to the manufacturers. *E.g.*, 49 C.F.R. §§ 571.103,S4.1 (1998) (requiring windshield defrosting

and defogging systems); 571.202,S4.3 (1998) (requiring head restraints). In fact, the very FMVSS in issue here states that it "specifies performance requirements" and does so "*by specifying equipment requirements* for active and passive restraint systems." 49 C.F.R. §§ 571.208,S1-S2 (emphasis added).

Petitioners further err in suggesting that the Act's reference to FMVSS's as "minimum standards," 15 U.S.C. § 1391(2), means that FMVSS's are *substantively* minimal. See Pet. Br. at 3, 21-22. As the Secretary has explained, "The word 'minimum' in the statutory definition of motor vehicle safety standards . . . does not refer to the substantive content of the standards but rather to their legal status—that the product covered must not fall short of them." 41 Fed. Reg. 2391, 2392 (1976). The Secretary hardly could have ruled otherwise. The Safety Act requires every FMVSS to "meet the need for motor vehicle safety" and "protect[] against unreasonable risk of death or injury." 15 U.S.C. §§ 1391(1), (2). *Cf. Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 168 n.19 (1978) (phrase "minimum standards" does not permit States to impose standards stricter than federal standards); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 674 (1993) (train speed limits established by federal agency "must be read as not only establishing a ceiling, but also precluding additional state regulation [by a common-law negligence action]").

Petitioners next argue that "only an inept grammarian" would say that States "establish" or "continue in effect" standards in common-law actions, Pet. Br. at 22, and that "it makes no sense" to construe "State or political subdivision of a State" to include state courts that apply common-law standards. Pet. Br. at 23. These assertions ignore this Court's holdings with respect to almost identical language.

The preemption provision in *Easterwood* stated, "A *State may adopt or continue in force* an additional or more stringent law, rule, regulation, order, or standard . . . when not incompatible with any Federal law . . . ." 507 U.S. at 662 n.2 (emphasis added). The Court stated, "Legal duties imposed on railroads by the common law fall within the scope of these broad phrases," *id.* at 664, and held preempted a claim that the defendant had breached its common-law duty to operate its trains at safe speeds, *id.* at 673-75.

Likewise, in *Medtronic* the preemption provision stated, "[N]o State or political subdivision of a State" may "establish or continue in effect . . . any requirement" differing from an on-point federal requirement. 518 U.S. at 481. The Court concluded that this language, too, encompassed state-law tort suits. *See Ouellette*, 479 U.S. at 493, 495; *Cipollone*, 505 U.S. at 522; *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26 (1981). In the same manner, section 1392 (d) precludes the States from establishing, or continuing in effect, common-law standards that differ from an on-point FMVSS.

Finally, Petitioners argue that the language of the saving clauses in section 1392(d) is inconsistent with an interpretation of the initial, preemptive sentence of section 1392(d) that encompasses common-law claims. Pet. Br. at 23-24. It is not. The saving clause in section 1392(d) allowing enforcement of common-law standards "identical to" federal standards was needed to, and does, enable States to continue to apply the common-law rule that violations of government safety standards constitute negligence *per se*. *See* Restatement (Second) of Torts § 288B(1) (1965). In any event, there is nothing inconsistent in having the preemptive sentence apply to statu-

tory, regulatory, and common-law standards, and having one or more saving clauses apply to specified subsets of those standards.

3. *Section 1392(d) Preempts Very Few Common-Law Claims*

Petitioners contend that if section 1392(d) applies to *any* common-law claim, it must "preempt almost all common law claims, leaving design defect victims with no remedy." Pet. Br. at 24. In fact, however, the instances in which section 1392(d) preempts common-law claims are exceedingly rare. No common-law claim is preempted unless the Secretary has established an FMVSS governing the *specific* aspect of performance attacked by the plaintiff. If an FMVSS requires certain equipment, but does not establish design requirements, plaintiffs can, and in large numbers do, allege that their injuries were caused by defects in the particular designs used by the manufacturers.

Thus, for example, although FMVSS 208 now requires airbags, it leaves the choice of design to the manufacturers. It does not establish the threshold collision speed that must cause the airbags to deploy, so plaintiffs are free to claim that the deployment threshold of a particular vehicle was too high or too low. *See Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992). It does not establish standards for gas temperatures or fabric materials, so plaintiffs are free to assert that a particular system was defectively designed in a manner that caused facial burns. *See Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23 (1st Cir. 1998). In sum, plaintiffs can assert any common-law standard that a state legislature could establish as a statutory standard for a private cause of action without differing from an

on-point FMVSS and thereby being preempted by section 1392(d).[6]

As a result, the design claims *not* preempted by section 1392(d) encompass almost all design-defect claims asserted by plaintiffs. Plaintiffs almost never claim that a vehicle is defective because it includes equipment required by an FMVSS or because it does not include equipment that an FMVSS explicitly says should not be required. *See Wood v. General Motors Corp.*, 865 F.2d 395, 402 n.9 (1st Cir. 1988) (conflict between common-law claims and FMVSS's, such as that requiring implied preemption of no-airbag claims, is a "rare event indeed"), *cert. denied*, 494 U.S. 1065 (1990). Accordingly, the preemptive effect of section 1392(d) on common-law claims is extremely narrow.

Most importantly, however, Petitioners beg the fundamental preemption question when they assert that preemption of a common-law claim should never be allowed because preemption "leav[es] design defect victims with no remedy." Pet. Br. at 24. As this Court has emphasized:

> Every pre-emption case involves a conflict between a claim of right under federal law and a claim of right under state law. A finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed.

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 584 (1981). Put differently, the question is not whether remedies should be provided for injuries caused by an unreasonably dangerous aspect of a vehicle. The fundamental

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[6] There is also no preemption of any claim that a defect resulted from a mistake, such as the omission of a fastener or weld, made during the manufacture of any item of equipment, since no FMVSS establishes any standard for any manufacturing process.

question is, Who should decide what is unreasonably dangerous? Congress delegated to the Secretary the power to determine when federal safety policies require an FMVSS to govern a particular vehicle aspect in order to "meet the need for motor vehicle safety" and "protect[] against unreasonable risk of death or injury." 15 U.S.C §§ 1391(1), (2). When the Secretary has established an on-point FMVSS for that purpose, federal policies and purposes require that her determination prevail over the view of an individual State that differs.

B. Section 1397(k) Does Not Narrow the Preemptive Scope of Section 1392(d)

Petitioners attempt to avoid express preemption by calling section 1397(k) of the Safety Act an "anti-preemption provision" and arguing that it precludes *any* form of preemption of *any* common-law claim. Pet. Br. at 14-15, 25-26, 37-39, 41. Under their theory, even when an FMVSS *requires* manufacturers to install specific equipment, plaintiffs can sue manufacturers for having done exactly that. At the same time, Petitioners concede that an otherwise identical claim asserted by the same plaintiffs under a state statute would be preempted. *See* Pet. Br. at 14, 21, 23.

The Safety Act cannot reasonably be interpreted to allow such bizarre and inconsistent results. It is simply inconceivable that Congress meant to "save" tort claims based on a common-law standard when those claims (i) would be preempted if based on a state statute and (ii) would penalize manufacturers under state law for having obeyed mandatory federal requirements.

To give section 1397(k) this strange meaning, Petitioners ignore the actual language of section 1397(k), the legislative history of section 1397(k), and the true

"anti-preemption" clauses in section 1392(d). All of these show that section 1397(k) does not address the scope of preemption mandated by section 1392(d) at all, much less entirely preclude preemption of common-law claims.

1. *The Text of Section 1397(k) Addresses the Defense of Compliance with Federal Standards, Not Section 1392(d) Preemption*

The statutory text shows that section 1397(k) does not address the scope of preemption under section 1392(d). Indeed, as the Solicitor General notes, "[T]he language of the clause does not directly address preemption at all." Br. for the United States at 18. Instead, it states: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." This is not the language Congress typically employs to restrict the scope of preemption; rather, this language refers to and negates compliance with government standards as a federal-law affirmative defense to the merits of a claim.[7]

The "compliance with" language differs dramatically from the encompassing saving-clause language Congress used both in section 1392(d) of the Safety Act and in

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[7] The titles of sections 1392(d) and 1397(k) further show that it is the former, not the latter, that addresses preemption. *See I.N.S. v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("title of a statute or section can aid in resolving an ambiguity in the legislation's text"). Section 1392(d) is entitled "Supremacy of federal standards." In contrast, the title of section 1397(k) mentions neither federal supremacy nor preemption; rather, its title is "Continuation of common law liability." Likewise, when Congress recodified the Safety Act in 1994, it relocated section 1392(d) at 49 U.S.C. § 30103(b), entitled "Preemption," but relocated section 1397(k) at 49 U.S.C. § 30103(e), entitled "Common law liability."

numerous other statutes when it intended to limit the scope of preemption. Section 1392(d) incorporates two saving clauses limiting the scope of its preemptive first sentence. Each begins with clear, unambiguous, and traditional anti-preemption saving language:

> *Nothing in this section shall be construed as preventing any State* from enforcing any safety standard which is identical to a Federal safety standard. *Nothing in this section shall be construed to prevent . . . the government of any State . . .* from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard. (Emphasis added.)

The saving clause in virtually every other preemption-limiting case decided by this Court has used similar anti-preemption language, not the narrow "compliance with" language of section 1397(k).[8]

The stark difference between the narrow "compliance with" language of section 1397(k) and the broad saving language used in section 1392(d) and other preemption-

[8] *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993) (29 U.S.C. § 1144(b)(2)(A)); *Morales*, 504 U.S. 374 (49 U.S.C. § 1506); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (42 U.S.C. §§ 2000e-7, 2000h-4); *Malone v. White Motor Corp.*, 435 U.S. 497 (1978) (29 U.S.C. § 309(b)); *Tallentire*, 477 U.S. 207 (46 U.S.C. § 767); *Gade v. National Solid Wastes Mgt. Ass'n*, 505 U.S. 88 (1992) (29 U.S.C. §§ 653(b)(4), 667(a)); *Ouellette*, 479 U.S. 481 (33 U.S.C. §§ 1365(a), 1370); *California v. F.E.R.C.*, 495 U.S. 490 (1990) (16 U.S.C. § 821); *Kalo Brick*, 450 U.S. 311 (49 U.S.C. § 22); *Mansell v. Mansell*, 490 U.S. 581 (1989) (10 U.S.C. § 1408(e)(6)); *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424 (1963) (47 U.S.C. § 414).

limiting statutes cannot properly be ignored. *See Tallentire*, 477 U.S. at 222. It is a difference between a constitutional doctrine and a merits defense.

When a defendant asserts that a plaintiff's claim is preempted, whether by the Safety Act or by any other federal law, courts do not ask whether the defendant complied with the federal law; rather, courts employ "essentially a two-step process" of (1) examining the state standard asserted by the plaintiff and (2) determining whether enforcement of that standard is expressly preempted by, or would conflict with, an applicable federal law. *Kalo Brick*, 450 U.S. at 317. *Accord Cipollone*, 505 U.S. at 523-24. This analysis requires no factual determination of whether the defendant complied with federal law. Here, for example, the court of appeals never considered whether the particular seat-belt system in the 1987 Accord complied with the FMVSS's governing seat-belt equipment and performance. *See* Pet. App. at 1-16.

If, however, the preemption analysis leads to a conclusion of no preemption, and *if* the case proceeds to trial, *then* the general common-law rule is that the defendant may seek to prove compliance with the federal law and argue that the jury should consider the compliance as evidence of the reasonableness of the defendant's conduct. The Restatement (Third) of Torts: Products Liability § 4(b), comment *e* (1998), succinctly explains the difference:

> An important distinction must be drawn between the subject addressed in Subsection (b) and the matter of federal preemption of state products liability law. Subsection (b) addresses the question of whether and to what extent, as a matter of state law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness.

> When a court concludes that a defendant is not liable by reason of having complied with a safety design or warnings statute or regulation, it is deciding that the product in question is not defective as a matter of the law of that state. . . . In contrast, in federal preemption, the court decides as a matter of federal law that the relevant federal statute or regulation reflects, expressly or impliedly, the intent of Congress to displace state law, including state tort law, with the federal statute or regulation.

See Wood, 865 F.2d at 417-18 (holding no-airbag claim impliedly preempted, and explaining that "preemption of a state product liability suit . . . is distinct from a defense on the merits").[9]

Thus, section 1397(k) makes clear that Congress did not intend to make compliance a merits defense as a matter of federal law, but instead intended to allow States to choose whether to give compliance its traditionally limited role as an item of evidence that juries may consider in determining the reasonableness of defendants' designs. Without section 1397(k), courts may have concluded

[9] Petitioners' most serious confusion of the issues appears in their assertion that "for 20 years after the Act's passage, the nation's appellate courts unanimously agreed that common law claims are not preempted by the Safety Act or by federal motor vehicle safety standards." Pet. Br. at 1-2 & n.2 (citing 13 cases). In truth, the cases they cite do not stand for that proposition at all; rather, all but one of them focus solely on whether evidence of compliance is admissible and provides an affirmative defense. *See, e.g., Schwartz v. American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983). None addresses express preemption or conflict preemption. The only one that addresses preemption at all is *Arbet v. Gussarson*, 66 Wis. 2d 551, 562, 225 N.W.2d 431, 438 (1975), which rejects only the sweeping argument that the Safety Act "preempt[s] the field of automobile safety regulation thus rendering state courts powerless to act in this area."

that Congress intended to federalize the recognized exception to that general rule by making proof of compliance with FMVSS requirements, even those only indirectly related to the precise design claims in issue, a complete affirmative defense on the merits.[10] Without section 1397(k), for example, courts might have held, contrary to *Perry, supra*, that by installing airbags in its 1999 MY cars, as required by FMVSS 208, a manufacturer became exempt from common-law claims alleging defects in the airbag design, even though FMVSS 208 does not establish airbag design requirements.

The clarification of congressional intent regarding the weight to be given to compliance evidence was especially important for diversity actions in federal courts. Before the enactment of the Federal Rules of Evidence in 1975, "[t]he situation especially was chaotic in the field of evidence, because the applicable rules and the weight given to state doctrine varied from circuit to circuit, from law to equity, and from one branch of the law of evidence to another." 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2401 (2d ed. 1998). Section 1397(k) made it clear that, in common-law product liability cases brought in federal courts, the courts

[10] Petitioners erroneously assert that, "[a]t the time the Safety Act was enacted (and still today), it was already the law in every state that compliance with a federal regulation is not an absolute defense in an action for negligent failure to do more." Pet. Br. at 27 n.11. In fact, however, in 1966 it was clear that under some circumstances "the minimum standard prescribed by the legislation or regulation may be accepted . . . by the court as a matter of law, as sufficient for the occasion . . . ." Restatement (Second) of Torts § 288C, comment *a* (1965); William L. Prosser, Law of Torts § 35, at p. 205 (3d ed. 1964) (same). In addition, since then, several States have adopted, for product-liability cases, various exceptions to the general rule that Petitioners present as an absolute rule. *See* Br. of the Alliance of Automobile Manufacturers and the Association of International Automobile Manufactures, Inc. at 24 n.11.

were to accord compliance evidence the weight given to it by applicable state law.[11]

2. *The Safety Act's Structure Confirms That Section 1397(k) Does Not Address Section 1392(d) Preemption*

The Safety Act's structure further shows that section 1397(k) was not intended to be a sweeping exception to section 1392(d). *Cf. Easterwood,* 507 U.S. at 664 ("Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue."). In *Easterwood* the Court indicated the importance of the locations of saving language and preemptive language relative to each other in a federal statute. The Court observed that the federal statute there "displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses" within the very same provision. 507 U.S. at 665. Here, in contrast, the Safety Act's preemption clause is neither prefaced nor succeeded in the same section by any saving clause for common-law actions. The "compliance with" clause does not appear until five full sections after the preemption provision.

In addition, as shown above, section 1392(d) does contain two "express saving clauses" immediately following the express preemption clause. *See* pp. 13-14, 22, *supra*. If Congress had intended section 1397(k) to constitute a third, and the most sweeping, limitation on preemption, Congress surely would have included it in its logical place, adjacent to the two saving clauses in the section labeled "Supremacy of federal standards."

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[11] This, as well as the text at pp. 18-20, 23-25, *supra*, explains why the Solicitor General is mistaken in suggesting that section 1397(k) would be rendered superfluous if section 1392(d) were to apply to any common-law claim. *See* Br. of the United States at 14.

3. *The Safety Act's Legislative History Further Confirms That Section 1397(k) Does Not Address Section 1392(d) Preemption*

The treatment of section 1397(k) in the House report, Conference report, and floor debates further confirms that it does not address section 1392(d) preemption.[12] The House and Conference reports both contain sections entitled "Preemption." *See* H.R. Rep. No. 1919, 89th Cong., 2d Sess. 16 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2731, 2732-33; H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966). Neither of them mentions section 1397(k); rather, they discuss only section 1392(d). The House report discusses section 1397(k) elsewhere, under the heading "Prohibited Acts and Exemptions." The Conference report does not mention it.

Senator Magnuson's description of section 1397(k) to the Senate after the House-Senate conference also shows that the section does not address section 1392(d) preemption. He stated:

> The Senate conferees accepted the House provision that compliance with Federal standards does not exempt any person from common law liability. This provision makes explicit, in the bill, a principle developed in the Senate report. This provision does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards. No court rules or evidence are intended to be altered by this provision.

112 Cong. Rec. 21,487 (1966). The "principle developed in the Senate report" was that FMVSS's "*need not* be interpreted as restricting State common law standards of

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[12] Because section 1397(k) was added to the Senate bill after the House and Senate conference, the Senate report does not discuss it.

care," and "[c]ompliance with such standards would thus *not necessarily* shield any person from product liability at common law." S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (emphasis added).

Thus, by adding section 1397(k), Congress intended to clarify that the Safety Act would not create a federal-law compliance defense and so would not "necessarily" shield a common-law defendant. If, as Petitioners contend, Congress intended section 1397(k) *always* to prevent *any* limit on *any* common-law claim, the words "not necessarily" and "need not" would be inconsistent with that purpose. If, on the other hand, section 1397(k) means what it says, it addresses only compliance as a merits defense and leaves preemption to section 1392(d) and ordinary conflict-preemption principles. That makes the legislative history sensible and consistent.

The snippets of legislative history Petitioners cite do not support a different conclusion. As the Solicitor General has noted, Petitioners fail to recognize that, just like section 1397(k) itself, the legislative history they cite does not address preemption at all, but instead discusses whether evidence of compliance with federal standards will be a complete defense or will be only evidence that juries may consider. *See* Br. for the United States at 19-20 & nn. 15-16.

II. PETITIONERS' NO-AIRBAG CLAIMS ARE IMPLIEDLY PREEMPTED BECAUSE THEY CONFLICT WITH THE SAFETY ACT AND FMVSS 208

The Supremacy Clause impliedly preempts state laws that would impede "the accomplishment and execution of the full purposes and objectives of Congress." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). As the court of appeals held, and as the

Secretary has long maintained, no-airbag claims like Petitioners' do conflict with the purposes and objectives of the Safety Act and FMVSS 208, and they are impliedly preempted by that conflict.

A. Petitioners' No-Airbag Claims Interfere with the Purposes and Policies of the Safety Act and FMVSS 208

Petitioners contend that their claims for $20,500,000, based on a contention that the common law requires 1987 Honda Accords to have airbags, do not conflict with the purposes and policies of the Safety Act and FMVSS 208 "since this lawsuit complements the goals of the Safety Act and Standard 208." Pet. Br. at 42. The Department of Transportation, interpreting its own regulation, disagrees.[13] *See* Br. for the United States at 15-29. Likewise, every United States Court of Appeals that has considered the question disagrees. *See* p. 6 n. 1, *supra*. Moreover, even if Petitioners' no-airbag claims were consistent with the Secretary's safety goals, this Court has rejected the notion that consistency of substantive goals suffices to preclude preemption:

> In determining whether [state common law] "stands as an obstacle" to the full implementation of the [federal law], it is not enough to say that the ultimate goal of both federal and state law is [the same]. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal.

Ouellette, 479 U.S. at 494. *See Perez v. Campbell*, 402 U.S. 637, 650-52 (1971) (whether conflict exists between

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[13] As the Solicitor General has explained, Petitioners and their *amici* have misconstrued the Secretary's statements by suggesting that she intended potential tort liability to be an incentive for manufacturers to install airbags. *See* Br. for the United States at 25-26 n. 22.

state and federal laws depends not on state law's purpose, but on state law's effect on federal regulatory plan).

1. *Petitioners' No-Airbag Claims Conflict with the Secretary's Determination That Requiring Airbags in 1987 MY Vehicles Would Disserve Federal Safety Purposes*

The Secretary's decision that airbags should not be required in 1987 MY vehicles rested on a careful balancing of safety considerations and a finding that, for several reasons, requiring airbags in those vehicles might *reduce* public safety. As recognized by the court of appeals below:

> [T]he United States ultimately concluded that a no-airbag claim was preempted in *Wood* because the Department of Transportation specifically determined that "an all airbag rule would disserve the safety purposes of the Act" and that this policy "would be disrupted by tort liability, which therefore would be preempted."

Pet. App. 16 (quoting Brief of the United States as Amicus Curiae, on Petition for a Writ of Certiorari at 7, *Wood v. General Motors Corp.*, 494 U.S. 1065 (1990)).

The Secretary identified several safety concerns. First, the only real-world data (as opposed to test data) regarding the effectiveness of airbags relative to the effectiveness of seat belts were too sparse to permit scientifically sound conclusions; and what data there were showed that airbags then available provided *no* increased safety over seat belts as used:

> Based on field experience through December 31, 1983, . . . the computed airbag and manual belt effectiveness (as used in equivalent cars) for fatalities is now the same. This means that airbags would not save any more lives than the belt systems as used in those cars.

49 Fed. Reg. 28962, 28985 (1984). Rejection of an airbag requirement was necessary to implement federal safety goals because "[w]idespread use of both [airbag systems and belt systems] is the only way to develop definitive data" as to their relative effectiveness. *Id.* at 29000, 29001. It also addressed the Secretary's concern that requiring airbags would impede safety by "stifl[ing] innovation in occupant-protection systems":

> [B]y restricting the manufacturers [to airbags], the Department runs the risk of killing or seriously retarding the development of more effective, efficient occupant protection systems.

Id. at 29001.

Second, the Secretary recognized that airbags continued to present unique safety dangers. She stated that the "lack of experience" regarding out-of-position occupants in some circumstances, "as well as the lack of experience for some companies in any form of airbag development, make the Department reluctant to mandate across-the-board airbags." *Id.* at 29001. She also cautioned that "the Department can not state for certain that airbags will never cause injury or death to a child." *Id.* at 28992. She expressed concern that airbags might indirectly cause injuries and deaths because "the high cost of replacing an airbag may lead to its not being replaced after deployment. The result would be no protection for the front seat occupants of such an automobile." *Id.* at 29001. And she identified risks that existed because

> [s]ome people have serious fears or concerns about airbags. If airbags were required in all cars, these fears, albeit unfounded, could lead to a backlash

> affecting the acceptability of airbags. This could lead to their being disarmed, or perhaps, to a repeat of the interlock reaction.

Id. at 29001.

Still further, the determination that airbags should not be required in 1987 was a crucial part of the Secretary's goal of achieving increased safety as quickly as possible by giving the States an incentive to do what they had refused to do for many years: enact laws requiring vehicle occupants to use their seat belts. This was because seat belts, unlike airbags, provided protection in side and rear crashes, rollovers, multiple impacts, and low-speed crashes. *Id.* at 28985-86, 28991, 29001. The Secretary stated:

> [A] substantial increase as a result of the widespread enactment of [mandatory-use laws] would provide increased safety benefits much more quickly and at a much lower cost . . . . The data . . . demonstrate the dramatic reductions in deaths and injuries that widespread usage of the manual belt systems would achieve.

Id. at 29003. *See id.* at 28997 (increased belt use "is the quickest, least expensive way by far to significantly reduce fatalities and injuries"). To induce the enactment of mandatory-use laws, the Secretary provided in FMVSS 208 that the passive-restraint requirement would be eliminated if two-thirds or more of the American population were covered by laws meeting specified criteria by April 1, 1989. *Id.* at 28963.[14]

Three years later, denying a petition for reconsideration of related rulemaking, the Secretary stated:

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[14] The Secretary's plan worked: "Indeed, it would appear that the passage of [mandatory-use laws] has in fact come about in *response* to the Secretary's rule." *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 487 n.25 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) (emphasis in original).

> The Insurance Institute for Highway Safety (IIHS) perhaps summed this issue up most clearly in its comment on the proposal, when it said: . . . "Each individual model with an air bag system requires a separate engineering development and crash testing program. *It wouldn't be responsible to pace the phase-in of air bags ahead of these constraints.*"

52 Fed. Reg. 42440, 42442 (1987) (emphasis added). The Secretary also noted that, even after the start of the 1987 model year, a major airbag supplier had stated that passenger-side airbags "may require a very energetic inflator which has the potential of injuring an out-of-position occupant. . . . To our knowledge, this technology has not been fully developed at this time . . . ." *Id.* The Secretary declared that any contention that passenger-side airbag technology was adequate "was based on false technical premises and faulty engineering judgment . . . ." *Id.* at 42443.

Thus, whereas Petitioners seek to establish a common-law standard that narrowly focuses on persons who want to claim that they would not have been injured had their 1987 MY vehicles included airbags, the Secretary, charged with promulgating nationwide standards that "protect[] against unreasonable risk of death or injury," forged a safety standard that carefully balanced the competing public interests of those persons and persons who might have been injured or killed had airbags been prematurely required. The Secretary determined that protection against unreasonable risk dictated that airbags not be required in 1987 MY vehicles.

As this Court made clear in *Kalo Brick*, this type of "reasonableness" balancing is a type of decision-making for which conflict preemption is particularly appropriate. There, after noting that the Interstate Commerce Act em-

powered the Interstate Commerce Commission "to pass on the reasonableness of a carrier's temporary suspension of its service," 450 U.S. at 319, the Court stated that, in making such a decision,

> the Commission must balance "the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other." Once the Commission has struck that balance, its conclusion is entitled to considerable deference. "The weight to be given [to each] is a matter which the experience of the Commission qualifies it to decide. And, under the statute, it is not a matter for judicial redecision." . . . The judgment as to what constitutes reasonableness belongs exclusively to the Commission. . . . A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress. . . .

450 U.S. at 321, 325-26 (citations omitted). *See City of New York v. F.C.C.*, 486 U.S. 57, 64 (1988). The same is true here, where the Secretary has determined, with respect to a particular aspect of vehicle performance, how best to protect the public from "unreasonable risk of injury or death" and has promulgated a federal standard that seeks to implement that determination in a specific manner.

Subsequent events have proved the importance and wisdom of the balance struck by the Secretary and her decsion not to force airbags to be rushed into production. In 1995 the Secretary reported that from 1991 to 1993, even with the phase-in time that FMVSS 208 had provided to address the risks, "approximately 54,000 injuries to occupants resulted from contacting an airbag." U.S. Dept. of Transp., National Accident Sampling System

Crashworthiness Data System 1991-1993, DOT HS 808 298, at viii (Aug. 1995). That number could well have been considerably greater had the Secretary prematurely rushed an airbag requirement into effect, or had common-law no-airbag claims been permitted to go forward despite the Secretary's determination.

Similar importance attaches to the Secretary's finding in her 1984 rulemaking that the airbags previously installed in production vehicles had provided *no* increased safety over seat belts as used. *See* pp. 30-31, *supra*. A 1977 study had estimated that passive restraints could prevent approximately 12,000 deaths annually, *State Farm*, 463 U.S. at 35. By 1980, better data had reduced that estimate to 9,000 lives saved annually. *Id.* at 38. Most importantly, in 1998, after tens of millions of airbag-equipped vehicles had been on the roads for several years, it turned out that the total number of lives saved by airbags between 1986 and 1998 was less than 3,200. 63 Fed. Reg. 49958, 49962 (1998).

Thus, events following the Secretary's 1984 decision that airbags should not be required in 1987 MY vehicles show that her judgment regarding both the uncertainty surrounding airbag risks and the uncertainty surrounding airbag benefits was correct and vitally important to federal safety policies.

2. *Petitioners' No-Airbag Claims Would Impede the Flexibility the Secretary Found Necessary to Implement Federal Safety Policies*

The common-law standard advocated by Petitioners also would permit each State to use the threat of repeated, massive compensatory and punitive damages awards to punish manufacturers for not installing airbags in 1987 MY vehicles. It would thereby undermine the flexibility

that the Secretary determined was necessary to "provide sufficient latitude for industry to develop the most effective [occupant-restraint] system." 49 Fed. Reg. at 28997.

This Court repeatedly has held that, when federal law implements federal policies by explicitly affording regulated entities a choice of specified options, the States cannot constitutionally limit them. *See, e.g., Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25 (1996); *de la Cuesta,* 458 U.S. at 155. Here, in like fashion, Petitioners' claims would frustrate the flexibility expressly provided by FMVSS 208. The Secretary provided this flexibility to foster technological innovation and field experience that would make a variety of passive restraint systems—belt systems, airbags, and "passive interiors"—safer and more acceptable to the public. 49 Fed. Reg. at 28962-63. The element of choice in the federal program, therefore, was not an expression of neutral indifference, but a purposeful element designed to address serious doubts about the safety and public acceptability of prematurely requiring the installation of airbags. *See Pokorny,* 902 F.2d at 1124 ("flexibility and choice is an essential element of the regulatory framework established in Standard 208"); Br. for the United States at 23-28.

Petitioners argue that the common-law standard they advocate would not impair that flexibility because it would not force manufacturers to change their conduct, but instead would only require manufacturers to compensate plaintiffs for their injuries. Pet. Br. at 47-48. Many times, however, this Court has found that common-law damages do tend to force actions that conflict with federal policies. *See Kalo Brick,* 450 U.S. at 325-26; *Ouellette,* 479 U.S. at 813.[15]

[15] Indeed, only three months after the Secretary published the version of FMVSS 208 in issue here, a group of plaintiffs' lawyers announced their goal of using no-airbag lawsuits to "force" vehicle manufacturers to install airbags on a more accelerated basis than the Secretary had determined would promote federal safety policies:

> [R]ecently, a small group of trial lawyers from around the nation has quietly developed a new strategy that they hope will move the airbag question out of the regulatory agencies and into the courts . . . . "We are trying to use economic pressure to force them to offer airbags," said [their spokesperson]."

Tamar Lewin, *The Air Bag Goes to Court,* N.Y. Times, Oct. 29, 1984, at 1 (Business Section).

Moreover, Petitioners' suggestion that the imposition of liability would require only compensation is at odds with their own complaint in this case, which seeks $10,500,000 in compensatory damages and $10,000,000 more in punitive damages. *E.g.,* J.A. 6-10. As the First Circuit recognized more than a decade ago in holding a no-airbag claim preempted:

> [I]t seems obvious that a damages award will have a pronounced effect on the manufacturer's future conduct. The same theory of recovery could be pursued by every front seat occupant injured in [a collision]. It is well known that injuries to front seat occupants are frequent; well over 20 lawsuits have been filed on the theory of absence of air bags in the last two years. . . . In these circumstances, General Motors' choice to avoid modification of its design "seems akin to the free choice of coming up for air after being underwater."

Wood, 865 F.2d at 410-11 (citation omitted).

Petitioners further miss the mark by arguing that the threat of such pronounced effects need not concern the Court in this case because the Secretary estimated in July 1984 that manufacturers would need at least three to four years to install airbags in all cars. Given the Secretary's determination that manufacturers could not install airbags in all cars until after the phase-in period ended on

September 1, 1989, Petitioners' argument must be that the Secretary believed it would not impair her carefully-structured program to allow thousands of plaintiffs to recover multiple millions of dollars in compensatory and punitive damages because manufacturers did not do something that they literally could not have done.

Petitioners ignore that the Secretary has long expressed a view different from theirs. *See* Br. of United States at 26-28. They also ignore that, in promulgating FMVSS's, the Secretary determines what is "reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment." 15 U.S.C. § 1392 (f)(3). *Accord* 15 U.S.C. §§ 1391(1), 1391(2), 1392(a). Having established a detailed schedule designed to phase in airbags in a reasonable, practicable, and appropriate manner, the Secretary cannot sensibly be deemed to have been indifferent to the adverse effects that the unbounded liability sought by Petitioners would wreak.

Petitioners try to circumvent that problem by arguing that, because the crash in this particular case occurred in 1992, after the phase-in period, their claims "could not possibly interfere with the government's decision to phase in passive restraints between 1986 and 1989." Pet. Br. at 45. That is a strange view of preemption. It argues that even if state law is for several years preempted by a federal law intended to induce manufacturers to produce a certain mixture of product features, and even if manufacturers during all those years produce products that promote federal policies in the exact manner intended and encouraged by the federal government, the preemption dissolves at the end of that period, thereby subjecting the manufacturers to liability as long as the once-protected products remain in use. Petitioners cite no authority for that view.

It makes no sense. Had preemption been so limited in 1984, the Secretary's policies would have been adversely affected during the phase-in period itself. Manufacturers could not have chosen to research, develop, and offer the variety of restraint systems that the Secretary had determined was *necessary* to promote federal safety policies; rather, they would have had to focus narrowly and solely on airbags. Because that conflict with federal policy is exactly what the preemption doctrine seeks to avoid, the fortuity that this crash occurred in 1992, rather than 1987, does not dissolve the conflict between federal law and Petitioners' no-airbag claims.

3. *Petitioners' No-Airbag Claims Conflict with the Federal Goal of Uniformity of Standards Where the Secretary Has Promulgated an On-Point FMVSS*

Both Houses of Congress emphasized that an important purpose of the Safety Act was to establish uniform national safety standards governing the design of motor vehicles used in all 50 States. The Senate stated:

> The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country.

S. Rep. No. 1301, 89th Cong., 2d Sess. 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. Similarly, the House stated:

> Basically, this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 17 (1966). In hearings on the Act, legislators and the Secretary of Commerce repeatedly stressed the importance of national uniformity.[16]

If the States could impose common-law standards differing not only from an on-point FMVSS, but among each other, as well, neither the public nor industry would be guided by one set of criteria; rather, as consumers drove from one State to another, they and the manufacturers of their vehicles would be subjected to the very "multiplicity of diverse standards" that Congress sought to avoid. As this Court stated in holding common-law tort claims impliedly preempted in *Kalo Brick*, 450 U.S. at 326: "A system under which each State could, through its courts, impose . . . its own requirements could hardly be more at odds with the uniformity contemplated by Congress . . . ." *See Ouellette*, 479 U.S. at 496. That conflict is no less severe when the claims seek damages for personal injuries. *See Tallentire*, 477 U.S. at 230 ("incongruous is the idea that a Congress seeking uniformity in maritime law would intend to allow widely divergent state law wrongful death statutes to be applied on the high seas").

Although recognizing that uniformity was one of the purposes of the Safety Act, Petitioners nevertheless argue

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16 *See*, Traffic Safety Hearings on H.R. 13228 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess., pt. 1, at 146 (1966) (Secretary of Commerce John T. Connor) ("We don't think that the objectives . . . can be accomplished on a piecemeal basis or by leaving the authority untouched that is now vested in the States and municipalities."); *id.* at 606-07 (Hon. William D. Hathaway) (uniform national standards necessary because multiple and inconsistent state standards would "creat[e] chaos"); 112 Cong. Rec. 14,253 (1966) (Sen. Magnuson) ("The [Act] will . . . establish a program of strict national standards for automobiles. . . . the only alternative is unthinkable—50 standards for 50 different states. I believe this would be chaotic.")

that no common-law claim can be preempted, because any preemption would restrict some plaintiffs' ability to sue vehicle manufacturers. Pet. Br. at 42-43. But Petitioners point to nothing indicating that Congress intended to resolve the occasional tension between plaintiffs' ability to sue manufacturers and the need for national uniformity in a manner that utterly destroys that uniformity. The narrow preemptive scope we have described achieves the resolution Congress intended.

Congress sought uniformity only as to the precise aspects of performance for which the Secretary determines that an FMVSS should be established. As we have shown (*see* pp. 18-19, *supra*), lawsuits in which plaintiffs seek to establish a common-law standard that directly conflicts with an on-point FMVSS are exceedingly rare. Therefore, judicial recognition that such claims are preempted promotes the national uniformity intended by Congress *and* leaves plaintiffs free to pursue all nonconflicting common-law claims.

Petitioners' interpretation, however, does nothing at all to promote uniformity in the instances in which Congress determined it was needed—namely, where the Secretary has established FMVSS's. Instead, they say, individual courts throughout the land should be free to establish conflicting common-law standards, even standards that impose liability for doing exactly what an on-point FMVSS requires. As the Solicitor General observes, that would "lead the Act 'to destroy itself.'" Br. for the United States at 22-23 (*quoting American Tel. & Tel. Co. v. Central Office Tel.*, 524 U.S. 214, 228 (1998)). The Act cannot reasonably be construed to do so.

In sum, as this Court has recognized, "improving [motor vehicle] safety does not admit to easy solution," "call[s] for considerable expertise," and requires that "the

effectiveness of [design changes] be studied, their costs examined, and public acceptance considered." *State Farm*, 463 U.S. 29, 33 (1983). After a comprehensive regulatory review, the Secretary exercised that expertise and concluded that requiring airbags in 1987 MY vehicles would disserve federal safety goals. Petitioners' attempt to impose just such a requirement as a common-law standard conflicts with that determination substantively *and* interferes with the regulatory methods chosen by the federal government to achieve the Safety Act's stated goals. The Supremacy Clause prohibits that result.

B. Sections 1392(d) and 1397(k) Do Not Preclude This Court from Conducting a Conflict-Preemption Analysis

Petitioners contend that courts, including this Court, are prohibited from conducting any conflict-preemption analysis of any common-law claim because section 1397(k) is an "unequivocal anti-preemption clause" that preserves "all common law claims," regardless of whether those claims completely undermine the purposes and policies of on-point federal motor vehicle safety standards. Pet. Br. at 34-35, 37. That is wrong for two reasons.

First, as shown above in detail needing no further discussion here, section 1397(k) does not address the scope of preemption under section 1392(d); rather, section 1397(k) addresses the legal effect of a manufacturer's "compliance with" a federal standard. *See* pp. 21-26, *supra*. For the same reasons, section 1397(k) does not address the preemptive effect of a direct conflict between a federal safety standard and the imposition of liability under state tort law.[17]

[17] In *Ouellette* this Court noted that the Senate Report discussing one of the two saving clauses there in issue stated, "Compliance with requirements under this Act would not be a defense to a common law action for . . . damages." 479 U.S. at 493 n.13. That language is almost identical to the language of section 1397(k) and its legislative history relied on by Petitioners here. Despite that language, the Court in *Ouellette* held that the two saving clauses did not preclude conflict preemption of certain common-law nuisance claims. The same result should obtain here.

Second, as we now show, a long line of decisions by this Court holds that even sweeping saving clauses that explicitly preserve common-law *and* statutory claims from preemption cannot properly be construed to prevent conflict preemption. Petitioners have identified no reason why the narrower language of section 1397(k) should occasion the overturning of that inveterate principle.

Petitioners concede that in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995), the Court rejected as "without merit" the argument that the existence of an express preemption provision precludes a finding of conflict preemption. They contend, however, that conflict preemption cannot exist where the federal statute in question contains both an express preemption provision and an express anti-preemption provision. *See* Pet. Br. at 34, 37. That contention ignores not only the conflict-preemption analysis that the Court conducted in *Myrick* itself, but two cases, *Kalo Brick* and *Boggs v. Boggs*, 520 U.S. 833 (1997), in which the Court found conflict preemption in just such situations. That contention also is at odds with the many cases in which this Court has found conflict preemption despite saving clauses that, unlike section 1397(k), used broad, unequivocal anti-preemption language.

In *Boggs* the Court was called upon to consider whether ERISA preempted a state law allowing a particular type of testamentary transfer. ERISA contained both an express preemption provision, 29 U.S.C. § 1144(a), and an express anti-preemption provision broadly mandating that

ERISA "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). Nevertheless, the Court bypassed both provisions, proceeded directly to a conflict-preemption analysis, and held the state law impliedly preempted, stating:

> We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the [express preemption provision] provides further and additional support for the pre-emption claim.
>
> . . . .
>
> In the face of this direct clash between state law and the provisions and objectives of ERISA, the state law cannot stand. Conventional conflict preemption principles require pre-emption "where compliance with both federal law and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

520 U.S. at 841, 844 (citation omitted).

In *Kalo Brick* the Court was called upon to consider whether certain common-law tort actions were preempted by a ruling by a federal agency acting pursuant to a statute that contained both an express preemption provision and a broad anti-preemption provision. *See* 450 U.S. at 328, 329 n.16. Again forgoing express-preemption analysis, the Court held the common-law actions impliedly preempted because they conflicted with federal purposes and policies. *Id.* at 325-27.

These cases show not only that conflict-preemption analysis can properly be conducted in statutes with both

an express preemption provision and an express anti-preemption provision, but also that, when the conflict is clear, conflict-preemption analysis can proceed without close analysis of those provisions. *See also Medtronic*, 518 U.S. at 503 (express preemption "may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis").

Moreover, the Court many times has held conflict preemption not precluded even by provisions that, unlike section 1397(k), (i) used broad, traditional anti-preemption language, rather than narrow "compliance with" language, (ii) broadly and explicitly preserved both common law and statutory law of the States, and (iii) appeared in federal statutes that did not expressly provide for any preemption at all. *See, e.g., Ouellette*, 479 U.S. at 492-94; *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446-47 (1907). It would make no sense to reach a different conclusion based on the limited language of section 1397(k). *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99 (1993) (ERISA's preemption provision and saving clause provide "no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis"; therefore, State law is preempted "where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."). As the Court explained in *Kalo Brick*, 450 U.S. at 328 (quoting *Puritan Coal*, 237 U.S. at 130), such saving clauses should be construed to have been included only because, without them,

> "it might have been claimed that, Congress having entered the field, the whole subject of liability . . . had been withdrawn from the jurisdiction of the state

> courts," so [the saving clause] was added to make plain that the Act "was not intended to deprive the state courts of their general and concurrent jurisdiction."

See Abilene Cotton, 204 U.S. at 446 (even broad anti-preemption clauses "cannot in reason be construed as continuing . . . a common law right" inconsistent with underlying federal aims).[18]

Finally, Petitioners recast their argument by asserting that, "given Congress' express prohibition of preemption of common law claims, NHTSA simply lacked the power to preempt such claims, even if it wanted to." Pet. Br. at 41. But this begs the question, which is whether Congress in fact intended section 1397(k) to preclude all forms of preemption, including conflict preemption.

It is undisputed that Congress broadly delegated to the Secretary the power to promulgate FMVSS's that she determined would "meet the need for motor vehicle safety" and "protect[] against unreasonable risk of death or injury". 15 U.S.C. §§ 1391(1), (2). Given this broad dele-

[18] Petitioners and all but one of their *amici* make no effort to address these cases. The one brief that makes an attempt, *see* Brief of the National Conference of State Legislatures, *et al.* ("NCSL") at 7-9, fails utterly. NCSL first observes that section 1397(k) refers only to common law and that the anti-preemption provisions in *Kalo Brick*, *Puritan Coal*, *Abilene Cotton Oil*, and other decisions of the Court swept more broadly by preserving *both* common law *and* state statutory law. NCSL then concludes from this that although the broader anti-preemption provisions in those cases did not preclude conflict preemption of common-law claims, section 1397(k) should be interpreted to do so. *Id.* at 8-9.

This is illogic of the first order. It argues that because section 1397(k) is *narrower* than the anti-preemption provisions in the cited cases, it should be given *broader* anti-preemptive effect. The opposite is true: Since section 1397(k) is narrower than the other provisions, any anti-preemptive effect it may have should be at least as limited as that of the other provisions.

gation, it is inconceivable that Congress intended to grant the Secretary power to preempt state statutes and regulations that conflict with the FMVSS's and in her judgment would undermine motor vehicle safety, but intended to withhold the power to preempt common-law standards that equally undermine her safety determinations. *See Kalo Brick*, 450 U.S. at 326-27. In conflict-preemption analysis, "a court's concern is necessarily with 'the nature of the activities which the States have sought to regulate,' " rather than with whether the States have chosen to regulate through their courts, their legislatures, or their administrative agencies. *Id.* at 317-18 (citation omitted). There is simply no "convincing reason why Congress would want to encourage states to impose an inconsistent safety standard of this nature by lawsuits but not by regulations." *Wood*, 865 F.2d at 412.

In 1991, Congress and the Secretary provided further evidence that the Safety Act cannot properly be read to preclude preemption of no-airbag claims. When Congress enacted the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991) ("ISTEA"), it mandated that airbags be required in all passenger cars built after August 31, 1997. Before Congress enacted ISTEA, however, the Secretary, through the Administrator of the National Highway Traffic Safety Administration, informed it that "most courts that have considered the matter have ruled that [no-airbag claims] are preempted by the . . . Safety Act and/or the safety standards issued by NHTSA." Letter to Congress from NHTSA Administrator Jerry Curry, November 7, 1991; H.R. Rep. No. 404, 102nd Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783 The Administrator cited three decisions by courts of appeals—*Pokorny*, *Wood*, and *Kitts*—that had held such claims preempted, and warned that if "federal law were revised to require

air bags in all cars, it is possible that some courts would conclude that these claims are no longer preempted." *Id.*

To avoid that result, Congress added this language:

> Nothing in this section or in the amendments made under this section to FMVSS 208 shall be construed by any person or court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Pub. L. No. 102-240 § 2508(d), 105 Stat. 1914, 2086. The Conference report expressly noted the Administrator's letter and stated that the conferees "do not want . . . to change the law on liability as it existed prior to enactment." H.R. Rep. No. 404, 102nd Cong., 1st Sess. 403 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1783. By thus expressly refusing to alter the preemption of no-airbag claims that it knew had been established in *Pokorny*, *Wood*, and *Kitts*, Congress indicated its acceptance of those decisions. *Cf. Haig v. Agee*, 453 U.S. 280, 300 (1981) ("congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy"); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-602 (1983).

In sum, an interpretation of the Safety Act that permits conflict preemption is consistent with the statutory titles, text, structure, and legislative history, and with the decisions of this Court. Petitioners' interpretation is not. Because the common-law standard Petitioners seek to enforce conflicts with the Safety Act and FMVSS 208, the court of appeals correctly held that their no-airbag claims are impliedly preempted.

CONCLUSION

The judgment of the court of appeals should be affirmed because Petitioners' no-airbag claims are expressly and impliedly preempted by the Safety Act and FMVSS 208.

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APPENDIX

STATUTORY APPENDIX

The National Traffic and Motor Vehicle Safety Act of 1966, as codified at Title 15 of the United States Code when the 1987 Honda Accord was manufactured and sold, provided, in pertinent part:

§ 1391. Definitions

As used in this subchapter—

(1) "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

(2) "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

. . . .

§ 1392. Motor vehicle safety standards

(a) Establishment

The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

. . . .

(d) Supremacy of federal standards; allowable higher standards for vehicles used by Federal or state governments

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

(e) Amendment and revocation of standards

The Secretary may by order amend or revoke any Federal motor vehicle safety standard established under this section. Such order shall specify the date on which such amendment or revocation is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date the order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

. . . .

(f) Factors to be considered in prescribing standards

In prescribing standards under this section, the Secretary shall—

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

. . . .

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

. . . .

(g) Interstate motor carriers and carriers of explosives and other dangerous articles

In prescribing safety regulations covering motor vehicles subject to chapter II of chapter 105 of Title 49, or the Transportation of Explosives Act, as amended (18 U.S.C. 831-835), the Secretary shall not adopt or continue in effect any safety regulation which differs from a motor vehicle safety standard issued by the Secretary under this subchapter, except that nothing in this subsection shall be deemed to prohibit the Secretary from prescribing for any motor vehicle operated by a carrier subject to regulation under either or both of such subchapter and Act, a

safety regulation which imposes a higher standard of performance subsequent to its manufacture than that required to comply with the applicable Federal standard at the time of manufacture.

(h) Issuance of initial federal safety standards

The Secretary shall issue initial Federal motor vehicle safety standards based upon existing safety standards on or before January 31, 1967. On or before January 31, 1968, the Secretary shall issue new and revised Federal motor vehicle safety standards under this subchapter.

. . . .

§ 1397. Prohibition against manufacture, sale, delivery, or importation of substandard vehicles and against rendering inoperative certain devices, elements of design or motor vehicle equipment

. . . .

(k) Continuation of common law liability

Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from liability under common law.

§ 1398. Civil penalties; Secretary's authority to compromise

(a) Whoever violates any provision of section 1397 of this title, or any regulation issued thereunder, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. . . .

* * * *

On July 5, 1994, Congress recodified the Safety Act "without substantive changes." Pub. L. No. 103-272, 108 Stat. 745, 941. The recodified provisions, in relevant

part, appear at Title 49 of the United States Code, as follows:

§ 30102. Definitions

(a) General definitions.—In this chapter—

. . . .

(8) "motor vehicle safety" means the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.

(9) "motor vehicle safety standard" means a minimum standard for motor vehicle or motor vehicle equipment performance.

. . . .

§ 30103. Relationship to other laws

(a) Uniformity of regulations.—The Secretary of Transportation may not prescribe a safety regulation related to a motor vehicle subject to subchapter I of chapter 135 of this title that differs from a motor vehicle safety standard prescribed under this chapter. However, the Secretary may prescribe, for a motor vehicle operated by a carrier subject to subchapter I of chapter 135, a safety regulation that imposes a higher standard of performance after manufacture than that required by an applicable standard in effect at the time of manufacture.

(b) Preemption.—(1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or

continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

. . . .

(e) Common law liability.—Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

§ 30111. Standards

(a) General requirements.—The Secretary of Transportation shall prescribe motor vehicle safety standards. Each standard shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms.

(b) Considerations and consultation.—When prescribing a motor vehicle safety standard under this chapter, the Secretary shall—

(1) consider relevant available motor vehicle safety information;

(2) consult with the agency established under the Act of August 20, 1958 (Public Law 85-684, 72 Stat. 635), and other appropriate State or interstate authorities (including legislative committees);

(3) consider whether a proposed standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which the standard will carry out section 30101 of this title.

(c) Cooperation.—The Secretary may advise, assist, and cooperate with departments, agencies, and instrumentalities of the United States Government, States, and other public and private agencies in developing motor vehicle safety standards.

(d) Effective dates of standards.—The Secretary shall specify the effective date of a motor vehicle safety standard prescribed under this chapter in the order prescribing the standard. A standard may not become effective before the 180th day after the standard is prescribed or later than one year after it is prescribed. However, the Secretary may prescribe a different effective date after finding, for good cause shown, that a different effective date is in the public interest and publishing the reasons for the finding.

. . . .

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IN THE

Supreme Court of the United States

Alexis Geier, *et al.*,

Petitioners,

v.

American Honda Motor Company, Inc., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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ARGUMENT

When Congress designed the federal auto safety regulatory system, it provided "[c]ompliance with *any* Federal motor vehicle safety standard does not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added). Yet Honda and its *amici* now insist that compliance with *this* Federal motor vehicle safety standard does exempt *this* defendant from *this* liability under common law. Before addressing their arguments in detail, we correct two misperceptions of our claims.

First, we do not claim that all cars manufactured in 1987 should have had airbags. Rather, we claim that the 1987 Honda Accord in this case was defectively designed because, as a result of the Accord's unique design characteristics (including, among other things, its shape, weight, and seating system), the manual lap belt and shoulder harness provided were insufficient to prevent Alexis Geier from suffering grievous injuries in a moderate-speed crash. J.A. 4-5. As far as we know, many other 1987 cars (including other cars manufactured by Honda) provided sufficient crash protection without an airbag. The car driven by Ms. Geier did not. That is why we contend it should have had an airbag.

Second, we do not challenge in any way, much less ask this Court (or a jury) to reconsider, the Secretary of Transportation's decision not to require airbags in all 1987 cars. We have no quarrel with the Secretary's regulatory decision to amend Standard 208 as she did. What we challenge here is the notion that, simply by making that decision, the Secretary exercised a different power – the power to preempt and immunize Honda from the Geiers' common law claims. For Congress did not give the Secretary that power, the Secretary did not purport to exercise it, and there is no conflict whatsoever between the Geiers' common law claims and the decision the Secretary actually made.

I. Petitioners' Claims Are Not Expressly Preempted.

Virtually all of the federal courts of appeals and state courts of last resort have held, and the United States agrees, that the Safety Act does not expressly preempt common law claims. *See* Petition at 9; U.S. Br. at 10-15. Honda's contrary arguments do not withstand scrutiny.

1. Honda's primary argument is that the Safety Act's express preemption provision, 15 U.S.C. § 1392(d), encompasses common law claims because it uses the term "safety standard," and "[t]his Court's decisions indicate that when Congress has prescribed the scope of preemption with a single broad term, rather than a catalogue of categories commonly subsumed by that term, the term should be construed to encompass those categories, including common-law claims." Resp. Br. at 12. But "safety standard" is not a "broad term" that naturally encompasses the entire gamut of state laws; in fact, it is much narrower than the express preemption terms in the cases cited by Honda.[1] In any event, it would have been bizarre for Congress to use the same term – "safety standard" – to apply narrowly with respect to federal law and, at the same time, to encompass all state laws, including common law claims. Honda does not cite any authority for that topsy turvy proposition.[2]

---

[1] *Compare, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 674 (1993) ("law, rule, regulation, order, or standard"); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) ("requirement or prohibition"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) ("law, rule, regulation, standard, or other provision having the force and effect of law").

[2] In fact, none of the cases cited by Honda supports its broad reading of Section 1392(d). For example, unlike the 1969 cigarette labeling act in *Cipollone*, Section 1392(d) contains no reference to the entire body

Honda attempts to salvage its overbroad reading of the Act's express preemption clause by arguing that "the instances in which [S]ection 1392(d) preempts common-law claims are exceeding rare." Resp. Br. at 18. But how can that be so? As a glance at the Federal Register will confirm, NHTSA has promulgated detailed minimum standards governing almost every imaginable aspect of motor vehicle performance. *See* 49 C.F.R. Part 571. If the preemption clause encompasses common law claims, then nearly every lawsuit alleging that a manufacturer should have done something more than the minimum required by NHTSA would be preempted. Honda might love this outcome, but there is no indication that Congress intended the Safety Act to grant Honda and its *amici* such a free ride.

2. Honda's express preemption argument ultimately fails because the Act's savings clause, 15 U.S.C. § 1397(k), expressly preserves all common law claims. Honda attempts to nullify the savings clause by arguing that it has nothing to do with preemption; instead, it says, Section 1397(k) only "negates compliance with government standards as a federal-law affirmative defense to the merits of the claim." Resp. Br. at 21. But that is not what Section 1397(k) says and cannot be what it means. For, under that interpretation, Congress intended the

---

of "state law." *See* 505 U.S. at 515. Also, unlike the Safety Act, most of the statutes in the cases cited by Honda – including *Cipollone*, *CSX*, and *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) – contain no express savings provision referring to common law claims. In fact, in *Cipollone*, at 523 n.22, a plurality of the Court relied on the *absence* of a savings provision as evidence that the 1969 act preempted some damage claims. *Cipollone* also noted that the savings provision of the Comprehensive Smokeless Tobacco Health Education Act, 14 U.S.C. § 4406 – which says that "[n]othing in this Act shall relieve any person from liability at common law or under State statutory law to any other person" – broadly *preserves* damages claims. *Id.* at 518; *see also id.* at 537 n.2.

savings clause to negate a defense to a claim that Section 1392(d) had already *eliminated* through preemption. Judge Selya, in his dissent in *Wood v. General Motors Corp.*, 865 F.2d 395, 426, (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990), articulated the central fallacy of this interpretation: "It would be a strange 'savings clause' indeed which could salvage an action on the merits in this fashion but be impuissant to stop preemption..."[3]

Honda insists that Section 1397(k) cannot apply to preemption because it does not start with the phrase "Nothing in this section shall be construed as preventing" or similar words. *See* Resp. Br. at 22. But nothing in this Court's precedents requires Congress to begin an anti-preemption clause with such words. Indeed, the notion that Congress must use some "magic words" to preclude a finding of preemption

[3] Congress also had no reason to negate an "absolute" state law compliance defense because, when the Safety Act was passed, it was *already* the law in every state that compliance with "an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions." *Restatement (Second) of Torts* § 288C (1965). Honda argues otherwise, quoting the 1965 Restatement as saying that "under some circumstances 'the minimum standard prescribed by the legislation or regulation may be accepted...by the court as a matter of law as sufficient for the occasion...'" Resp. Br. at 25 n.10 (quoting comment a). But Honda omits the remainder of the comment, which confirms that "if for any reason a reasonable man would take additional precautions, the provision does not preclude a finding that the actor should do so." Moreover, if (as Honda claims) Section 1397(k) expressly bars the use of compliance as a defense, then it would bar the States from deciding that compliance *could* be used as a defense – which Honda's *amici* now says at least one state has done. *See* Alliance of Automobile Manuf. Br. at 25 n.10.

contradicts both the presumption against preemption and common sense.[4]

In the end, Honda relies on the Safety Act's legislative history to buttress its "compliance defense" interpretation of Section 1397(k). Resp. Br. at 27. But that history devastates Honda's position. Section 1397(k) was added by the House of Representatives, and the House Report specifically provides that the clause "establishes[ ] that compliance with safety standards is not to be a defense *or otherwise to affect the rights* of parties under common law..." H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added). Of course, the most fundamental "right[ ] of parties under common law" is the right to sue in the first place. Thus, the House Report makes clear that the savings clause has precisely the meaning given it by petitioners: it expressly preserves common law claims.

[4] None of the cases cited by Honda supports its assertion that "magic words" are needed. Moreover, the cases are distinguishable on myriad grounds. For example, *Morales*, 504 U.S. at 385, held that a "general" savings clause that was a "relic" did not supercede a "specific" preemption provision added to the legislation much later. In contrast, Section 1397(k) is more "specific" than and was added *after* Section 1392(d). Similarly, the savings clause in *International Paper v. Ouellette*, 479 U.S. 481, 493 (1987), unlike Section 1397(k), was limited by the words "Nothing in this section" and did "not purport to preclude preemption of state law by other provisions of the Act." And the savings clause in the Interstate Commerce Act cases contained a proviso – "but the provisions of this act are in addition to such remedies" – which prompted the Court to find that its "manifest" and "evident[ ]" purpose was to preclude an inference from other provisions of the Act that the federal remedies provided were exclusive (allowing the States to exercise concurrent jurisdiction over claimed violations), but not to permit remedies inconsistent with the Act's substantive provisions. *Chicago & N.W. Tr. Co. v. Kalo Brick & Title Co.*, 450 U.S. 311, 328 (1981); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446-47 (1907).

II. Congress' Plain Words Preclude Any Inquiry Into Implied Conflict Preemption.

Given Congress' express preservation of common law claims, any resort to implied conflict preemption analysis is improper. As the Court said in *Cipollone*, 505 U.S. at 517, when Congress' express words provide "a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws." The United States' and Honda's arguments to the contrary are meritless.

1. The United States argues that, because conflict preemption stems directly from operation of the Supremacy Clause, the Court should "assume" that Congress intended to preempt any state common law claims viewed as conflicting with a federal standard unless there is a "solid basis" for believing that Congress "intended fundamentally to alter traditional preemption analysis." U.S. Br. at 17. The government's concession that Congress *can* preserve common law claims that would otherwise conflict with federal law is important, but the United States' approach still has it backwards. First, preemption analysis starts with the assumption that state law is *not* preempted.[5] Second, federal regulatory agencies only have the power to preempt state law that Congress gives them.[6] Thus, this Court should "assume" the opposite of what the United States proposes: absent a "solid basis" for finding that Congress intended to give NHTSA the power to preempt state common law claims, such claims are not preempted – even if a court might view them as conflicting with some standard adopted by NHTSA.[7]

2. Here, of course, there is no basis for believing that Congress gave NHTSA the power to preempt common law claims. To the contrary, Section 1397(k) is a *rock* "solid basis" for finding that Congress expressly denied NHTSA that power. *John Hancock*, 510 U.S. at 99. Indeed, "[i]t is difficult to imagine what language Congress could have used to make the point more clear." *Munroe v. Galati*, 938 P.2d 1114, 1118 (Ariz. 1997). The United States and Honda have only three contrary proposals to offer. First, the United States says that "[n]othing in the text of the clause suggests that common law liability is saved ... even if it conflicts with a federal safety standard." U.S. Br. at 18. But the text *does* suggest that; it says compliance "does not exempt *any* person from *any* liability under common law." "Any" means *any*. There was no reason

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[5] As part of its argument, the United States improperly asserts (without citation to any authority) that the presumption against preemption does not apply to implied conflict preemption. *See* U.S. Br. at 18 n.13. *See also* GM Br. at 18-19. In fact, the presumption applies with full force to conflict preemption. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715, 720-21 (1985). *See also Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring); *id.* at 115 (Souter, J., dissenting). This makes sense. If the presumption is to be employed when interpreting Congress' *express* language, a court should be even more cautious in *implying* Congress' intent to preempt state law from far less reliable indicators.

[6] The Supremacy Clause – which states that "the Constitution and the Laws of the United States . . . are the supreme Law of the Land," U.S. Const. Art. VI, Cl. 2 – does not alter that fact. *Congress* makes the "Laws of the United States." Federal regulatory agencies can only promulgate such "Laws" to the extent that Congress empowers them to do so.

[7] The United States, at 17-18, cites *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993), in support of its proposed assumption, but that case hardly turned the traditional approach to preemption on its head. To the contrary, it held that, in enacting ERISA, Congress did not intend to "alter traditional analysis" by making "state law, not federal law [,] preemptive." *Id.* at 99, 101.

for Congress to elaborate on that all-encompassing word. Second, the United States says that, because Section 1397(k) does not contain the word "preemption," it does not "address preemption at all." U.S. Br. at 18. The government, however, has previously taken the position that Section 1397(k) and similar clauses *do* address and *negate* preemption.[8] Moreover, this Court routinely interprets statutory provisions as preventing preemption even when they do not contain that word in their title or in text. *See, e.g., California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281-82 (1987); *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978). Third, Honda and the United States say that Congress should have included the text of Section 1397(k) in or immediately after Section 1392(d). Resp. Br. at 26; U.S. Br. at 18, 20. But Congress had no reason to do that, especially since (as the United States agrees) Section 1392(d) does not encompass common law claims.[9]

[8] See *Freightliner Corp. v. Myrick*, No. 94-286 (October Term, 1994), Brief for United States as *Amicus Curiae* Supporting Respondents, at 14-18 (interpreting Safety Act); *Lewis v. Brunswick Corp.*, No. 97-288 (October Term 1997), Brief for United States as *Amicus Curiae* Supporting Petitioners, at 21-25 (interpreting nearly identical savings clause in Federal Boat Safety Act of 1971, 46 U.S.C. § 4311(g), as "mak[ing] clear Congress' explicit intent to preserve tort liability.") In its *Freightliner* brief at 14-18, the United States argued at length that Section 1397(k) precludes a finding of express preemption under the Safety Act. The United States rejects Honda's express preemption argument here, *see* U.S. Br. at 11-15, but it now contends (as does Honda) that, because Section 1397(k) does not contain the word "preemption," the clause merely addresses compliance with federal standards as a defense, not preemption. *Id.* at 18-22. We have already rebutted that contention in I(2), above.

[9] Honda also defends its "you-can-always-get-to-implied-preemption" approach by stating that this Court routinely decides cases on implied conflict preemption grounds without bothering to address whether state law is expressly preempted. *See* Resp. Br. at 43-45. The cases cited by Honda, however, have no bearing here. For example, in *Boggs v. Boggs*, 520 U.S. 833 (1997), this Court proceeded directly to implied conflict

3. Finally, Honda and the United States insist that implied preemption cannot be barred here because it is "simply inconceivable" that Congress intended to preserve common law claims that could otherwise be viewed as conflicting with federal law. Resp. Br. at 20; *see also* U.S. Br. at 22-23. But, as this Court has recognized, Congress has done that before. For example, in *Cipollone*, 505 U.S. at 518-19, this Court held that all common law claims were left intact by a 1965 cigarette labeling act, including failure-to-warn and misrepresentation claims based on the cigarette warning labels dictated by federal law. And the Court held that, given Congress' clear words, any resort to implied preemption analysis would be improper. *Id.* at 517. If Congress intended this result in 1965, why is it "inconceivable" that Congress preserved all common law claims when it passed the Safety Act in 1966, one year later?

It may be "inconceivable" to Honda and the United States that Congress would preempt state statutory and regulatory standards that differ from federal standards, while leaving all common law claims in place, but there are many good reasons why Congress might adopt this approach. For example: (1) Congress might be urged by competing political factions to preempt state prescriptive standards and leave the common law intact and, for political reasons, decide to do what the competing factions urged; (2) Congress might want to address matters of regulation, but not compensation, because compensation has traditionally been addressed by the States; (3)

preemption without considering whether the statute at issue – ERISA – expressly preempted state law because the Court had previously decided that ERISA's preemption and savings clauses do *not* manifest an intent by Congress to preserve state law that conflicts with federal purposes. *See, e.g., John Hancock*, 510 U.S. at 99. And in *Kalo Brick*, 450 U.S. at 311, the Court *did* construe the meaning of an express savings clause in the statute at issue, concluding that the clause did not salvage a state law that would interfere with federal occupation of the regulatory field. *Id.* at 330.

Congress might want to create a floor for the operation of the market (requiring a minimum level of safety) but otherwise leave the market (including the incentives created by state tort law) unfettered; (4) Congress might trust the States to ensure that common law accords sufficient weight to compliance with government standards as a defense; (5) Congress might understand that, even if a State decided a manufacturer could be held liable for doing something required by federal law (or failing to do something prohibited by federal law), that manufacturer could not be forced to violate federal law – it could only be forced to pay damages to the plaintiff; and (6) Congress might think that, in the unlikely event that this occurred, it might spur the manufacturer to urge, and the federal government to consider, amending the standard.

4. Under our Constitutional system, because Congress might have had these or other good reasons, the courts cannot ignore Congress' words and embark on an implied preemption inquiry. Wherever that inquiry took them, it would be a "fundamentally lawless path," Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988), § 6-26, at 483 n.8, and an enormous waste of judicial resources. *Cipollone* and the precedents it stemmed from show that path is forbidden. *See* Pet. Br. at 38-40. Because of the Constitutional values implicated here, many commentators have urged this Court to adopt in this context the clear statement rules it currently applies in the Tenth and Eleventh Amendment cases.[10] Under

[10] *See, e.g.*, Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 Boston U. L. Rev. 559, 627 (June 1997); John A. Chatowski, *Cipollone and the Clear Statement Rule: Doctrinal Anomaly or New Development in Federal Preemption*, 44 Syracuse L. Rev. 769 (1993); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Constitutional Law Quarterly 29 (1988); Tribe, *supra*, § 6-26, at 482 n.8.

those rules, even if the Safety Act did *not* include a savings clause, any resort to implied conflict preemption would be barred. This Court need not decide that issue here, however, because Congress did *not* speak ambiguously in the Safety Act; it clearly and unequivocally preserved common law claims. That being so, the courts may not seek out (much less purport to find) a supposed implied Congressional intent to preempt petitioners' claims against Honda.[11]

III. Even If Implied Preemption Could Be Considered, Petitioners' Claims Do Not Conflict With Federal Law.

In any event, petitioners' claims are not impliedly preempted because they do not conflict with Standard 208. The absence of a direct conflict is patent: the Geiers do not seek to hold Honda liable for doing something required by federal law

[11] In our opening brief at 40-41, we gave an additional reason why resort to implied preemption here would be improper: NHTSA's utter failure to suggest that Standard 208 might preempt any common law claims. The United States argues that the absence of any agency intent to preempt is immaterial because "conflict preemption arises not from a specific intent to preempt but from the direct operation of the Supremacy Clause . . .." U.S. Br. at 27. But this Court has previously relied on the absence of any express statement by an agency of its intent to preempt to counsel against a finding of conflict preemption. *Hillsborough*, 471 U.S. at 721 ("since the agency has not suggested that the county ordinances interfere with federal goals, we are reluctant in the absence of strong evidence to find a threat to the federal goal of ensuring sufficient plasma."). Not only is such "strong evidence" lacking here, but (as we show below) the agency gave every indication that it intended to *rely* on tort liability to promote its regulatory agenda. Under these circumstances, a finding of implied conflict preemption would undermine the entire notice-and-comment process and create the wrong incentive for other agencies considering promulgating regulations that might have some preemptive effect.

or for failing to do something prohibited by federal law. To the contrary, they seek to hold Honda liable for failing to do something that federal law both permitted *and encouraged*: the installation of what the manufacturers conceded and the federal government found was the "most effective system of all...the combination of an airbag and a manual lap and shoulder belt." 49 Fed. Reg. at 28966, 28986. Yet Honda and the United States contend that these claims conflict with federal law. We address the United States' arguments first.[12]

1. The most astonishing argument is advanced by the federal government, which insists – three separate times – that, Secretary Dole actually decided in 1984 that no-airbag claims would conflict with Standard 208. Thus, the United States demands respect for "the Secretary's reasonable conclusion that claims such as petitioners' would thwart the purpose behind Standard 208." U.S. Br. at 28. It says "the question is not whether tort liability in general stifles innovation but whether liability for failure to install airbags would have done so. The Secretary determined that it would." *Id.* at 29. And it implores the Court to "decline petitioners' invitation to second-guess that reasonable determination." *Id.* ***But these assertions are false.***

[12] The United States contends that its position is entitled to "substantial weight," relying on *Medtronic*, 518 U.S. at 496. U.S. Br. at 26-27. *Medtronic* merely held that, in the absence of a clear congressional command as to preemption, a court may accord weight to an agency's formal regulatory pronouncements regarding preemption. *See id.* at 495-96. That is a far cry from this case, where Congress has spoken clearly on the issue of preemption, *compare id.* at 505, and NHTSA never gave any indication (let alone issued formal regulations) that Standard 208 would preempt common law tort claims. (Indeed, as we show below, it gave every indication to the contrary.) Under these circumstances, no deference is permitted or due. *See Bowen v. Georgetown University*, 488 U.S. 204, 212 (1988) (no deference due to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice).

The government provides no citation to the Secretary's supposed determinations because they do not exist. The Secretary never made them. This would be a far different case if she had.

2. In fact, the Secretary actually said she would *rely* on the threat of no-airbag liability to achieve her goals. *See* Pet. Br. at 10-12. Responding to complaints that "manufacturers would use the cheapest system to comply with [the] automatic restraint requirement," Secretary Dole said that "*potential liability for any deficient systems*" would help ensure that manufacturers did not use "the least expensive alternatives." 49 Fed. Reg. at 29000 (emphasis added). The United States argues that "[p]etitioners misunderstand the Secretary's statement, which meant that manufacturers could face tort liability if they installed defective passive restraints." U.S. Br. at 25. This assertion, however, is no more true than those exposed above. The Secretary was not talking about "defective" passive restraints. The context demonstrates that her references to "the cheapest system[s]" and "the least expensive alternatives" were to *automatic seatbelts* (which were far less expensive – albeit less effective – than airbags) and the "tort liability" she was referring to was no-airbag liability. *See, e.g.*, 49 Fed. Reg. at 28989 (chart comparing cost of airbags relative to automatic belts). Indeed, one key problem with airbags was their relatively high cost. *See id.* at 28969, 28974, 28975, 28991, 28992. Secretary Dole reasonably saw no-airbag claims as furthering her policy goals, since the manufacturers were not likely to avoid the cheapest systems absent sufficient economic incentive to do so.

There is, therefore, no indication in the regulatory record that the Secretary ever suggested, much less decided, that no-airbag claims would conflict with her policy goals or be preempted. To the contrary, the preamble proves that NHTSA

saw no conflict between such claims and Standard 208 (and did not think they would be preempted). Under the heading "Product Liability," NHTSA identified a "potential source of manufacturer liability" that it quoted from Stephen Teret of the National Association for Public Health Policy: "People whose crash injury would have been averted had the car been equipped with an air bag can sue the car manufacturer to recover the dollar value of the injury." 49 Fed. Reg. at 28972. The government now says that "an agency does not endorse a comment merely by describing it," U.S. Br. at 26 n.22, which is true, but federal regulation (especially federal preemption of state law by regulation) is not a game of "Gotcha!" For the government to identify and quote this "potential source of manufacturer liability" in 1984 without suggesting or quoting a contrary view, but now assert preemption of that liability, is simply untenable. *See* n.11, *supra*.

3. Nevertheless, the United States now argues that the Geiers' common law claims are impliedly preempted because they conflict with Secretary Dole's 1984 policy of encouraging a variety of passive restraints. That argument, however, does not apply to the Geiers' claims and is flawed at the core.

a. The government's argument does not apply to the Geiers' claims because *the car in this case did not have any passive restraints*. Petitioners' lawsuit alleges that Honda should have installed airbags (in addition to manual restraints) in a car that had *no* passive restraints. If Honda did that, its actions would in no way decrease the variety of other passive restraints available. The government's argument may apply logically to common law claims that a manufacturer should have installed airbags (instead of another type of passive restraint) in a car that actually *had* some other type of passive restraint – because, if all manufacturers did that, their actions *would* decrease the variety of passive restraints available. But

it has no logical application to claims (like the Geiers') that a manufacturer should have installed airbags (in addition to manual restraints) in a car that had no passive restraints whatsoever. Thus, even if the government's argument is right, it does not apply to the claims in this case.[13]

b. The United States' argument, however, is not right. It is based on three false factual premises. The government contends that (a) "If, when the Secretary promulgated the rule in 1984,...manufacturers had known that they could later be held liable for failure to install airbags," then (b) that "would likely have led them to install airbags in all cars," and (c) that would have, "[a]t the very least, interfered with the method by which Standard 208 was designed to reach its goals." U.S. Br. at 25 (brackets deleted). But (a) as we have just shown above, the manufacturers *did* know in 1984 they could later be held liable for failure to install airbags (and had no reason to think otherwise); (b) they did *not* respond to the threat of liability by installing airbags in all cars; and (c) even if they had, they would have done so in response to the very method by which Standard 208 was designed to achieve its goals – *i.e.*, by responding to the risk of "potential liability for deficient systems." 49 Fed. Reg. at 29000.

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[13] The United States' argument also does not apply here because the government concedes that, even under its theory, "a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car because of other design features particular to that car...would not necessarily frustrate Standard 208's purposes." U.S. Br. at 26. But if this case is viewed (as the government erroneously views it) just like one saying a manufacturer should have installed airbags rather than another type of passive restraint, then this is exactly the type of case the government concedes is not preempted – for it turns on the design features particular to the 1987 Accord. *See supra* at 1.

c. In addition to ignoring the facts, the United States disregards the potential impact of other common law claims on the auto makers' conduct. Thus, the government assumes that, if no-airbag claims were permitted, manufacturers would have immediately installed airbags in all cars. But, since *all* common law claims were left in place, manufacturers could also have been held liable for not installing other forms of passive restraints (such as automatic seatbelts) in appropriate cases, as well as for injuries caused by airbags. Thus, if Honda is right, and airbags were not the safest passive restraints for all cars (*see* Resp. Br. at 31), the auto makers would not respond to tort incentives by installing airbags in all cars – indeed, it would have been folly for them to do so. The Secretary knew this and expected that, because of the high costs associated with airbags, most manufacturers would still choose to install manual or automatic belts. *See* 49 Fed. Reg. at 29000. That is why she built additional incentives into the rule – the phase-in period and the "extra credit" system – to further encourage the use of airbags. *See id.*

d. Moreover, the United States improperly treats diversity as the Secretary's ultimate goal in promulgating Standard 208. But the Secretary *encouraged* diversity; she did not *require it.* In fact, she encouraged diversity – and relied on tort liability – as a means to an end. The end was prompting the manufacturers to develop and install, and the public to accept, the safest and most cost-effective passive restraint system possible. If that system turned out to be airbags, any other single system, or a combination of devices and approaches, so be it. In other words, although the government says that an all-airbag (or, presumably, an "all-anything") result would conflict with the Secretary's goals, *see* U.S. Br. at 9, the Secretary never *prohibited* such a result, she just declined to *impose* it. (If Standard 208 had required that no more than X percent of cars have airbags, this would be a far different case.) The

Secretary's approach (unlike a government mandate requiring airbags) left the manufacturers free to develop and install whatever the best system was, and then (by relying on market forces, including tort exposure) encouraged them to develop and install even better systems in the future. Preempting common law claims based on the failure to install airbags (and/or other forms of passive restraints) would undercut that approach, elevate variety over safety, and eliminate the tort incentive for manufacturers to jettison dangerous designs and adopt safer ones. That is not what the Secretary had in mind.[14]

e. Finally, the government's theory would lead to perverse results. According to the United States, U.S. Br. at 29 n.27, crash victims like the Geiers cannot sue the auto makers for failing to install airbags and/or automatic seatbelts and/or any other forms of passive restraints in their cars – all because NHTSA adopted a regulatory amendment in 1984 designed to *encourage* the auto companies to install passive restraints generally and airbags specifically. Presumably, however, crash

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[14] There is accordingly no basis for the United States' suggestion that imposition of tort liability for no-airbag claims would undercut the Secretary's determination that "experience with a variety of passive restraints would best promote public acceptance [of airbags.]" U.S. Br. at 28. As explained above, the Secretary understood that tort liability would *not* discourage diversity. Moreover, if the threat of tort liability did prompt manufacturers to install airbags, the auto makers would make every effort to *promote* their acceptability – which is exactly what NHTSA wanted. *See* Pet. Br. at 48. The United States admits "[t]hat may be true," but contends that "speculation of [this] sort...cannot displace the Secretary's reasonable conclusion that claims such as petitioners' would thwart the purposes behind Standard 208." U.S. Br. at 28. But this brings the United States full circle, because the Secretary never *made* any determination that tort liability would undermine the public acceptability of airbags.

victims in vehicles or vehicle positions not covered by the 1984 amendment still can bring no-airbag claims. So, drivers and passengers in vehicles manufactured before 1984 still can sue; passengers in trucks, tractors, and multi-purpose vehicles such as jeeps still can sue (because those vehicles were excluded from the 1984 amendment, *see* 49 Fed. Reg. at 28996); and passengers in the front center and rear seats of cars still can sue (because those seating positions were also excluded from the 1984 amendment, *see id.*). The only people who cannot sue are the ones the government sought to "help." Neither Congress nor the Secretary intended such bizarre results, which would discourage all Americans from seeking federal regulatory action to enhance auto safety.

4. Honda's implied preemption arguments would also lead to incredible outcomes and stretch the doctrine far beyond Constitutionally-permissible bounds.

a. Honda's first argument – that the Geiers' claims are preempted because Secretary Dole decided not to require airbags in all cars – is a variation of the government's argument rebutted in ¶ 2.d. above and is deficient for the same reasons. Honda's argument, however, goes way beyond the government's. Honda says common law claims are impliedly preempted whenever "the Secretary has determined, with respect to a particular aspect of vehicle performance, how best to protect the public from 'unreasonable risk of injury or death' and has promulgated a federal standard that seeks to implement that determination in a specific manner." Resp. Br. at 34. But that test is met every time the Secretary issues a federal standard.

b. Honda's second argument – that the Geiers' claims are preempted because they would impede the flexibility the Secretary provided in Standard 208 – ignores the fact that the

Secretary authorized the manufacturers to exercise that flexibility *subject to potential tort liability*. As part of this argument, Honda emphasizes that Standard 208 gave it optional means for compliance, but we have already explained in our opening brief, at 46-47, why that fact does not matter – and the United States agrees. *See* U.S. Br. at 21 n.18 and accompanying text (noting other standards providing optional means of compliance). Honda may think that liability concerns should not affect its choice of design options, but Congress and Secretary Dole thought otherwise.[15]

c. Honda's third argument – that the Geiers' claims are preempted because they conflict with the federal goal of uniform standards – would preempt almost all common law claims and is negated by the express terms of the Safety Act itself. As we explained in our opening brief at 43, uniform safety standards may be the goal of Section 1392(d), but preservation of all common law claims is the goal of Section 1397(k). Congress adopted both sections. Its express preservation of common law claims must be respected.[16]

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[15] Honda's reliance, at 36, on *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), and *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), in support of its options argument is misplaced. *Barnett* did not involve common law claims. And in *Fidelity*, the Court noted that "it would have been difficult for Congress to [have given] the Board a broader mandate," the Board *expressly* stated its intent to preempt *all* state law, and the statute contained no savings clause preserving common law claims. *Id.* at 3026, 3028.

[16] Honda's closing argument, at 47, is that the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991), affirmatively endorsed the decisions finding no-airbag claims impliedly preempted by Standard 208. But that statute takes no position on the preemption issue. Section 2508(d) of the Act says that neither the section nor the Act shall "be construed by any court as indicating an intention by Congress to affect, change, or modify in any way the liability,

CONCLUSION

The lower court's decision finding preemption of petitioners' claims should be reversed.

Respectfully submitted,

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if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints." The Senate-House Conference Report says, "This section is not to be a 'sword' or a 'shield' in litigation or otherwise." H.R. Rep. No. 102-404, 102d Cong., 1st Sess., at 401 (1991).

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No. 98-1811

In the Supreme Court of the United States

ALEXIS GEIER, ET AL., PETITIONERS

v.

AMERICAN HONDA MOTOR COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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Washington, D.C. 20590

3518

QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 *et seq.* (1988), or Federal Motor Vehicle Safety Standard 208, 49 C.F.R. 571.208 (1987), preempts a state common law tort claim that an automobile manufactured in 1987 was defectively designed because it lacked an airbag.

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In the Supreme Court of the United States

No. 98-1811

ALEXIS GEIER, ET AL., PETITIONERS

v.

AMERICAN HONDA MOTOR COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 *et seq.* (1988), requires the Secretary of Transportation to promulgate motor vehicle safety standards. 15 U.S.C. 1392(a).[1] This case concerns the preemptive effect of the Act and one of those standards, Federal Motor Vehicle Safety Standard 208, 49 C.F.R. 571.208 (1987), which governs occupant crash protection. The Court's decision may affect the manner in which the Secretary exercises his regulatory authority under the Act.

[1] The Act was recodified, along with other Acts governing transportation, on July 5, 1994, "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745; see § 1(e), 108 Stat. 941-973 (codifying new 49 U.S.C. 30101 *et seq.*). Like the court of appeals and petitioners, we generally refer to the earlier version of the Act.

STATEMENT

1. Congress enacted the National Traffic and Motor Safety Vehicle Act of 1966 (Safety Act or Act) to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. 1381. The Act directs the Secretary of Transportation to "establish by order motor vehicle safety standards," 15 U.S.C. 1392(a), which are defined as "minimum standard[s] for motor vehicle performance or motor vehicle equipment performance," 15 U.S.C. 1391(2). Each standard "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. 1392(a).

The Safety Act contains a preemption provision, which provides in relevant part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. 1392(d).[2] The Act also contains a provision, which petitioners refer to as a savings clause, that describes the effect of compliance with federal standards on common law liability. That clause provides that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. 1397(k).[3]

[2] As we explain in note 1, *supra*, the Safety Act was amended and recodified in 1994 without substantive change. Section 1392(d) is now codified at 49 U.S.C. 30103(b)(1) and states in relevant part:

> When a motor vehicle safety standard is in effect under this chapter, a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

2. Federal Motor Vehicle Safety Standard 208 regulates occupant crash protection. 49 C.F.R. 571.208. The Secretary promulgated the version of Standard 208 at issue in this case in 1984, after nearly 15 years of analysis, rulemaking, and litigation. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34-38 (1983); *State Farm Mut. Auto. Ins. Co.* v. *Dole*, 802 F.2d 474, 477-478 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987).

Beginning with the 1987 model year (in which petitioners' car was manufactured), Standard 208 phased in a requirement that all new passenger cars have some type of passive restraint system, *i.e.*, a device that works automatically, without any action by the occupants, to help protect occupants from injury during a collision. Standard 208 required manufacturers to install some type of passive restraint in at least 10% of their 1987 model year cars. 49 C.F.R. 571.208.S4.1.3.1.[4]

[3] Section 1397(k) is now codified at 49 U.S.C. 30103(e), which states: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."

[4] The percentages increased each year until the 1990 model year. Beginning in that model year, all new cars were required to have a passive restraint system. 49 C.F.R. 571.208.S4.1.3.2, 571.208.S4.1.3.3, 571.208.S4.1.4. In response to the Intermodal Surface Transportation Efficiency Act of 1991, 49 U.S.C. 30127, the Secretary has amended Standard 208 to require that, beginning in the 1998 model year, all new cars have an airbag at the driver's and right front passenger's position. 49 C.F.R. 571.208.S4.1.5.3. Section 30127(f)(2) provides that "[t]his section and the

The rule did not, however, require installation of any particular type of passive restraint. Instead, it gave manufacturers the option to install automatic seatbelts, airbags, or any other suitable technology that they might develop, provided they met the performance requirements specified in the rule.

In adopting that standard, the Secretary expressly considered, and rejected, a proposal to require airbags in all cars. See 49 Fed. Reg. 29,000-29,002 (1984). The Secretary reasoned that some people had serious concerns about airbags, and, if airbags were required in all cars, there could be a public backlash in which some people disabled the airbags, thus eliminating their safety benefit. *Id.* at 29,001. The Secretary also concluded that, although airbags and seatbelts together may provide greater safety benefits than automatic seatbelts alone, the effectiveness of an airbag system is "substantially diminished" if, as then often occurred, the occupant does not wear the seatbelt. *Id.* at 28,996. Further, airbags were found "unlikely to be as cost effective" as automatic seatbelts, and, because of the high replacement cost of airbags, some people might not replace them after deployment, leaving no automatic protection for front seat occupants. *Id.* at 29,001. Finally, little developmental work had been done to install airbags in smaller cars, and the Secretary found that unrestrained occupants, particularly children, could be injured by the deployment of airbags in those cars. *Ibid.*

In light of those concerns, the Secretary determined that manufacturers should have a choice of ways to

amendments to Standard 208 made under this section may not be construed as indicating an intention by Congress to affect any liability of a motor vehicle manufacturer under applicable law related to vehicles with or without [airbags]."

comply with the passive restraint requirement. 49 Fed. Reg. at 28,997. The Secretary anticipated that manufacturers would respond to that choice by using a variety of passive restraints, including airbags and automatic seatbelts. Although airbags were more expensive than automatic seatbelts, the Secretary expected manufacturers to install airbags in some cars because one manufacturer had already begun to offer airbags, others had indicated plans to do so, and the rule provided an incentive to use airbags and other non-belt technologies. *Ibid.*[5]

The Secretary concluded that installation of a variety of passive restraint systems would have several safety advantages. The latitude provided the industry would enable manufacturers to "develop the most effective systems" and would "not discourag[e] the development of other technologies." 49 Fed. Reg. at 28,997. In addition, the availability of alternative devices would enable the industry to "overcome any concerns about public acceptability by permitting some public choice." *Ibid.* Customers who did not like airbags could buy a car with automatic seatbelts, and those who did not want the automatic belts could select a car with airbags. *Ibid.* Finally, widespread use of both airbags and automatic seatbelts was "the only way to develop definitive data" about which alternative is more effective. *Ibid.*[6]

[5] In determining whether a manufacturer installed passive restraints in the requisite percentage of its fleet during the phase-in period, Standard 208 counted each car with an airbag or other non-belt passive restraint as the equivalent of 1.5 cars with automatic seatbelts. 49 C.F.R. 571.208 S4.1.3.4; 49 Fed. Reg. at 29,000.

[6] The Secretary also concluded that a gradual phase-in of the passive restraint requirement would better serve the Act's safety purpose than a uniform implementation on a single future date.

3. In January 1992, while driving a 1987 Honda Accord, petitioner Alexis Geier collided with a tree in the District of Columbia. Although she was wearing her seatbelt, she sustained "serious and grievous injuries." J.A. 2-5. Ms. Geier and her parents (also petitioners) sued respondent American Honda Motor Company, Inc., in the United States District Court for the District of Columbia. Pet. App. 2 n.1. Alleging that their car was negligently and defectively designed because it lacked a driver's-side airbag in addition to a manual seatbelt, they sought damages under the common law of the District of Columbia. Pet. Br. 12.

The district court granted respondent's motion for summary judgment. Pet. App. 17-20. The court held that petitioners' tort claims were expressly preempted by the Safety Act because recovery on the claims would be "equivalent to a safety standard promulgated by the state legislature or a state regulatory body." *Id.* at 19.

4. The court of appeals affirmed, but it employed a different preemption analysis. Pet. App. 1-16. The court acknowledged that the term "standard" in the Safety Act's preemption provision could be read in isolation to encompass requirements imposed by common law tort verdicts, but the court recognized that the preemption clause must be interpreted in light of the entire Safety Act, including the savings clause. *Id.* at 9-

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One purpose of the phase-in was to achieve the installation of passive restraints in some cars earlier than if a single effective date had been established, since it would have taken longer for all cars to be redesigned to include a passive restraint. The phase-in also increased the likelihood that manufacturers would use airbags, which required a longer lead time for redesign. Finally, the phase-in gave consumers and the agency time to develop more information about the benefits of passive restraints, thus enhancing the opportunity to overcome public resistance. 49 Fed. Reg. at 28,999-29,000.

11. The court ultimately found it unnecessary to resolve the express preemption question, because it concluded that a verdict in petitioners' favor "would stand as an obstacle to the federal government's chosen method of achieving the Act's safety objectives, and consequently, the Act impliedly pre-empts [the] lawsuit." *Id.* at 12.

The court of appeals rejected petitioners' claim that this Court's decision in *Cipollone* v. *Liggett Group*, 505 U.S. 504 (1992), prevents courts from conducting implied preemption analysis when a statute has an express preemption provision and a savings clause. Pet. App. 12-13. The court of appeals noted that this Court rejected a similar argument in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), in which the Court engaged in implied preemption analysis after concluding that the Safety Act did not expressly preempt the state tort claim at issue.

Applying implied preemption analysis, the court of appeals determined that "allowing liability for the absence of airbags would 'interfer[e] with the *method* by which Congress intended to meet its goal of increasing automobile safety.'" Pet. App. 14 (citation omitted). The court explained:

> A successful no-airbag claim would mean that an automobile without an airbag was defectively designed. Congress, however, delegated authority to prescribe specific motor vehicle safety standards to the Secretary of Transportation, who in turn explicitly rejected requiring airbags in all cars on the ground that a more flexible approach would better serve public safety.

Ibid. (citation omitted). The Secretary had decided that a choice among passive restraint systems would advance public safety by "allowing consumers to adjust to

the new technology and by permitting experimentation with designs for even safer systems." *Id.* at 15. The court therefore concluded that "allowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department's policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." *Ibid.*

SUMMARY OF ARGUMENT

Petitioners' tort claims are not expressly preempted by the Safety Act, but they are impliedly preempted because they conflict with Standard 208. The Safety Act's preemption clause, 15 U.S.C. 1392(d), does not bar the claims, because, particularly when read in conjunction with the Act's savings clause, 15 U.S.C. 1397(k), it expressly preempts only prescriptive rules affirmatively promulgated by a state legislature or administrative agency. Although the reference in the preemption provision to a state "standard" could, in isolation, be understood to encompass common law tort rules, that reading is not consistent with the remainder of the Act, including the express reference to "common law" in Section 1397(k). Moreover, if Section 1392(d) preempted all common law actions involving the same aspect of performance as a federal safety standard, there would be no meaningful role for Section 1397(k), which provides that compliance with a federal safety standard does not "exempt" a person from common law liability.

The Secretary of Transportation has therefore long taken the view that, although state legislatures and administrative agencies may not adopt a safety standard that differs from a federal standard governing the same aspect of performance, state courts are not necessarily precluded from entering tort judgments that a

vehicle was defectively designed with respect to that aspect of performance. That interpretation could create some tension within the Safety Act, but any tension reflects a congressional compromise between the interests in uniformity and in permitting States to compensate accident victims.

There is no danger that tort liability will undermine the Act, because common law claims still must yield if they conflict with federal safety standards. Section 1397(k) does not preserve those claims because it neither refers to preemption nor states that common law liability is preserved even if it conflicts with a federal standard. Congress legislates against the background of the Supremacy Clause, which provides that state law yields if it conflicts with federal law. Thus, absent a solid basis to believe that Congress intended to alter traditional preemption analysis, a statute should not be interpreted to permit state laws to operate in a manner that conflicts with federal law.

Petitioners' claims conflict with Federal Motor Vehicle Safety Standard 208, because a judgment for petitioners would stand as an obstacle to the accomplishment of the full purposes and objectives of the Standard. In promulgating the version of Standard 208 that was in effect when petitioners' car was manufactured, the Secretary rejected a proposal to require airbags in all cars, because she determined that safety would best be served if manufacturers were permitted at that time to install a variety of passive restraints. Petitioners' attempt to hold a manufacturer liable for failing to install a particular type of passive restraint—an airbag—would conflict with that policy of encouraging a diversity of passive restraints. Petitioners' claims are therefore preempted.

ARGUMENT

THE SAFETY ACT DOES NOT EXPRESSLY PREEMPT PETITIONERS' TORT CLAIMS, BUT THE CLAIMS ARE IMPLIEDLY PREEMPTED BECAUSE A JUDGMENT FOR PETITIONERS WOULD FRUSTRATE THE PURPOSES OF STANDARD 208

In cases addressing whether the Safety Act or Standard 208 preempts tort claims that an automobile is defectively or negligently designed because it does not contain an airbag, the parties, and some courts, have tended to take an all-or-nothing view of preemption. Manufacturers have argued, and some courts have held, that Section 1392(d) preempts any common law ruling imposing a standard of care greater than the standard set by federal law. See, *e.g.*, *Harris* v. *Ford Motor Co.*, 110 F.3d 1410, 1413-1415 (9th Cir. 1997); *Wood* v. *General Motors Corp.*, 865 F.2d 395, 412-413 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990). In contrast, plaintiffs have argued (as do petitioners in this case) that a federal safety standard can never preempt a tort claim because Section 1397(k) preserves all common law actions.

We agree with neither approach. As this Court has explained, when a federal regulatory scheme preserves a role for state law, "conflict-pre-emption analysis must be applied sensitively * * * to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 515 (1989).

The Secretary's longstanding view is that, read in the full statutory context, Section 1392(d) prohibits state legislative or administrative bodies from prescribing safety standards different from those prescribed by the Secretary but does not expressly preempt state tort

claims. At the same time, the Secretary's view has been that Section 1397(k) does not preserve tort claims that actually conflict with a federal standard but rather provides that compliance with federal standards does not, in itself, immunize manufacturers from liability. See U.S. Amicus Br. at 16 & n.10, 28-29, *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); U.S. Amicus Br. at 7-16, *Wood* v. *General Motors Corp.*, 494 U.S 1065 (1990) (No. 89-46). That view is entitled to "substantial weight." *Medtronic, Inc.*, v. *Lohr*, 518 U.S. 470, 496 (1996); *id.* at 505-506 (Breyer, J., concurring).

Petitioners' tort claims that their vehicle was defectively and negligently designed because it lacked an airbag are thus not expressly preempted by the Safety Act. Their claims are, however, preempted by implication, because a judgment for petitioners would frustrate Standard 208's policy of encouraging a variety of passive restraints.

A. The Safety Act Does Not Expressly Preempt Petitioners' Tort Claims.

In 1987, when petitioners' automobile was manufactured, the Safety Act's preemption clause stated:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. 1392(d).[7] It is our view that, read in its statutory context, this provision expressly preempts only prescriptive rules affirmatively promulgated by a state legislature or administrative agency.

The term "standard," construed in isolation, could be read to encompass duties imposed by tort law. The common law of torts is sometimes described in general terms as articulating "standards of care" to be applied on a case-by-case basis to assess a defendant's conduct and fault. See S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966); cf. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) (legal duties imposed by common law fall within scope of "law, rule, regulation, order, or standard relating to railroad safety"); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 246-247 (1959). However, "standard" may also connote a prescriptive criterion, adopted in advance by responsible authorities, such as legislative or administrative bodies.[8] Consideration of the Safety Act as a whole confirms that this is the meaning of "standard" as used in the express preemption provision of Section 1392(d).

Unlike the statute in *CSX*, which preempted any relevant "law, rule, regulation, order or standard" (507 U.S. at 664), and thus reached every method by which a State can impose legal obligations, or the statutes in *Cipollone* v. *Liggett Group*, 505 U.S. 504 (1992), and *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), Section

[7] As explained at notes 1-2, *supra*, that provision has been amended and recodified at 49 U.S.C. 30103(b)(1), but the amendments were not intended to be substantive.

[8] See *Webster's Third New International Dictionary* 2223 (1993) (def. 3a "something that is established by authority, custom, or general consent as a model or example to be followed: *CRITERION, TEST*;" def. 4 "something that is set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality").

1392(d) preempts only "safety standard[s]," which is also the term used to describe the administrative requirements promulgated by the Secretary. See 15 U.S.C. 1392(a). Moreover, Section 1392(d) uses the verb "establish" to describe the enactment of the state standards it preempts, just as the Safety Act uses that verb to describe the promulgation of standards by the Secretary. See 15 U.S.C. 1392.[9] It is a "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) (internal quotation marks omitted). Further, Section 1392(d) preempts standards established by a "State or political subdivision of a State," a phrase not normally used to describe a court in a common law damages action. Finally, the Act defines standards as providing "objective criteria," 15 U.S.C. 1391(2); see also 15 U.S.C. 1392(a) ("objective terms"), a description that would appear to exclude tort judgments, which are case-specific determinations of liability and damages.

Our interpretation of Section 1392(d) is further buttressed by the specific reference to common law in Section 1397(k), which states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[10] The reference to common law liability in that Section suggests that Congress

[9] The recodification uses "prescribe" to describe the enactment of both state and federal standards. See 49 U.S.C. 30103(b)(1); note 2, *supra*. The use of "prescribe," which was not intended as a substantive change from the use of "establish" in the former 15 U.S.C. 1392(d) (see note 1, *supra*), confirms that "standards" are limited to positive enactments.

[10] As we have explained in notes 1 & 3, *supra*, this Section is now codified as amended at 49 U.S.C. 30103(e), but the changes were not intended to alter the substance of the provision.

would have referred to common law expressly in Section 1392(d) if it had wanted to preempt all common law actions involving the same aspect of performance as a federal safety standard. See, *e.g.*, *City of Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 338 (1994).

Finally, if Section 1392(d) preempted all common law tort actions involving the same aspect of performance as a federal safety standard, there would be no meaningful role for Section 1397(k). That Section provides that compliance with a federal safety standard does not "exempt" a person from, *i.e.*, provide a defense to, common law liability. See 15 U.S.C. 1397(k); H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) ("compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law"). There is, however, no need to negate a defense to claims that have already been preempted. And the only claims that would not be preempted under the broad reading of Section 1392(d) are those that involve an aspect of performance not addressed by any federal standard. Yet no court would otherwise have held that compliance with a federal standard provided a defense to such a suit. Congress could not have intended the preemption provision to sweep so broadly that it renders superfluous another provision in the Act. See, *e.g.*, *Gustafson*, 513 U.S. at 574.[11]

For those reasons, the Safety Act prohibits state legislatures and administrative agencies from adopting

[11] The only remaining role for Section 1397(k) would be to disavow congressional intent to occupy the field and thereby displace all tort actions involving motor vehicle safety. But even that role is unnecessary because the preemption provision itself makes the lack of field preemption clear by permitting States to establish standards identical to the federal standards and standards covering aspects of performance not addressed by the federal standards. See 15 U.S.C. 1392(d).

prescriptive safety standards that differ from a federal standard governing the same aspect of performance. It does not, however, necessarily preclude state courts from entering tort judgments that a vehicle was defectively designed with respect to that aspect of performance.

That interpretation could create some tension within the Safety Act, because allowing manufacturers to be held liable for design defects in vehicles that comply with federal standards could run counter to Congress's interest in uniform performance standards. But any tension reflects a congressional compromise between the interests in uniformity and in permitting States to compensate accident victims, embodied both in the savings clause (15 U.S.C. 1397(k)) and in the definition of a federal standard as a "minimum standard" (15 U.S.C. 1391(2)). See *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). Moreover, tort suits can sometimes complement federal regulations and the Act's safety purpose by supplying manufacturers with an additional incentive to design a safe product. See *Medtronic*, 518 U.S. at 495. Finally, there is no danger that tort liability will impair the purpose of the Act, because, as we explain below, common law claims still must yield if they conflict with federal standards. Cf. *Silkwood*, 464 U.S. at 256 (conflict preemption analysis still applies despite congressional intent generally to preserve state tort actions).

B. Standard 208 Impliedly Preempts Petitioners' Tort Claims.

State law is impliedly preempted if it is "impossible for a private party to comply with both state and federal requirements * * * or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [federal law].'"

English v. *General Elec. Co.*, 496 U.S. 72, 79 (1990) (citations omitted). Petitioners' tort claims are pre-empted under that analysis. Holding respondent liable for not installing airbags in petitioners' car would frustrate Standard 208's policy of encouraging a variety of passive restraints.

1. Contrary to petitioners' contention (Br. 25-41), the Safety Act's savings clause, 15 U.S.C. 1397(k), does not foreclose implied preemption analysis.

a. As an initial matter, any suggestion (see Pet. Br. 37-38) that the presence of a savings clause automatically precludes implied preemption analysis is incorrect. Savings clauses vary significantly in both phraseology and context, and, as with any other statutory provision, a court must ascertain the meaning of the specific clause. Cf. *Freightliner*, 514 U.S. at 289.[12] Thus, this Court frequently conducts implied preemption analysis even though a statute contains a savings clause. Indeed, the Court hesitates to read a savings clause to authorize claims that conflict with federal law. See, *e.g.*, *American Telephone & Telegraph Co.* (*AT&T*) v. *Central Office Telephone*, 524 U.S. 214, 227-228 (1998); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987); *Chicago & N.W. Trans. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328

[12] Petitioners' reliance (Br. 38) on *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978), and *California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272 (1987), is unpersuasive. In *Malone*, the issue was essentially field preemption, and the Court held that two savings provisions (more broadly worded than the one at issue here) indicated that the federal labor statutes did not foreclose all state regulation of pension plans. 435 U.S. at 504-505. In *Guerra*, the plurality examined the savings provisions in the Civil Rights Act of 1964 and found that "Congress has indicated that state laws will be pre-empted only if they actually conflict with federal law" (479 U.S. at 281); see also *id.* at 295-296 (Scalia, J., concurring).

(1981); *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

There is good reason for that approach. Conflict preemption arises directly from the operation of the Supremacy Clause (U.S. Const. Art. VI, Cl. 2), rather than from a specific intent to displace state law. Thus, "[a] holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963). Similarly, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" may be impliedly preempted by a federal statute, even in the absence of any expression of intent to supersede state law-making authority. See *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 540-543 (1977). Those implied preemption principles are equally applicable to conflicts between state laws and federal regulations. Whether or not Congress has addressed preemption, "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York* v. *FCC*, 486 U.S. 57, 64 (1988).

Because Congress enacts laws against the background of the Supremacy Clause, a court should assume that Congress believes that federal law (whether enacted directly by Congress or promulgated by a federal agency pursuant to statutory authorization) will prevail in any collision with state law. Of course, Congress is free to change the general rule and to allow state laws to operate in the place of conflicting federal law. But absent a "solid basis" for believing that Congress "intended fundamentally to alter traditional preemption analysis," *John Hancock Mut. Life Ins. Co.*

v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 99 (1993), a statute should not be interpreted to permit state laws to operate in conflict with federal law.[13]

The presumption that Congress does not intend to alter traditional principles of conflict preemption is particularly appropriate when Congress enacts a statute such as the Safety Act that takes effect through administrative action. Congress did not itself prescribe motor vehicle safety standards in the Safety Act. Instead, it delegated their promulgation (and revision in light of experience) to the Secretary of Transportation. Thus, Congress could not know what federal standards would be promulgated, and it could not predict whether or how States might adopt conflicting measures.

b. The Act's savings clause, Section 1397(k), provides no sound basis to conclude that Congress intended to alter the general rule that federal law preempts conflicting state law. Nothing in the text of the clause suggests that common law liability is saved from preemption even if it conflicts with a federal safety standard. Indeed, the language of the clause does not directly address preemption at all. It states that "[c]ompliance with any Federal motor vehicle safety standard issued under [the Safety Act] does not exempt any person from any liability under common law." 15 U.S.C. 1397(k).[14] As we have explained, the

[13] Petitioners therefore err in suggesting (Br. 38-39) that the presumption that cautions against unduly broad construction of preemption provisions favors their reading of the savings clause. The presumption against preemption of state laws that can coexist harmoniously with federal law is quite different from a presumption in favor of preservation of state laws that conflict with federal law.

[14] The recodification substituted the modifier "a" for "any," note 3, *supra*, without intending substantive change, note 1, *supra*.

clause thus preserves common law liability in the sense that a manufacturer cannot invoke its compliance with federal law as an automatic defense against a claim that a car was defectively designed. See p. 14, *supra*. The clause does not, however, preserve common law liability that conflicts with federal law.

The legislative history supports that interpretation. The provision originated in the House of Representatives, and the House Report expressly states that the clause "establishes[] that compliance with safety standards is not to be a *defense* or otherwise to affect the rights of parties under common law." See H.R. Rep. No. 1776, *supra*, at 24 (emphasis added). Other references in the legislative history are consistent with the understanding that Section 1397(k) negates a substantive defense to liability and does not directly address preemption.[15] Petitioners have not identified,

The fact that Congress perceived no distinction between the use of the words "a" and "any" refutes the suggestion (see Pet. Br. 25) that the use of "any" was intended to signal a broad construction of the clause.

[15] See, *e.g.*, S. Rep. No. 1301, *supra*, at 12 (explaining that federal standards "*need not* be interpreted as *restricting* State common law standards of care" so that compliance with federal standards "would thus *not necessarily* shield any person from product liability at common law") (emphasis added); 112 Cong. Rec. 14,230 (1966) (Sen. Magnuson) (also using qualifier "not necessarily"); *id.* at 21,487 (Sen. Magnuson) (stating that Senate conferees adopted the House provision, which "makes explicit, in the bill, a principle developed in the Senate report"); *ibid.* (explaining that the provision does not prevent use of compliance or noncompliance as "evidence"); *id.* at 21,490 (Sen. Cotton) ("proof of compliance" may be offered "for such relevance and weight as courts and juries may give it"). Petitioners also rely (Br. 29) on the comments of a witness at House hearings who expressed the concern that manufacturers would respond to lawsuits with a claim that "Our product meets Government standards." Comments by members of the public reveal little about congressional intent. In

and we have not found, any statement in the legislative history that describes Section 1397(k) as preserving from preemption common law claims that conflict with federal law.[16]

That interpretation of Section 1397(k) is reinforced by the fact that Congress did not include the savings clause in the Section of the Safety Act that addresses preemption (Section 103(d) (codified at 15 U.S.C. 1392(d))) but inserted it five sections later (Section 108(c) (codified at 15 U.S.C. 1397(k))). Thus, the structure of the Act confirms that the savings clause was not intended directly to address preemption.[17]

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any event, the witness's concern was precisely that manufacturers would use compliance with federal standards as a substantive defense to liability.

[16] As noted in the text, the House Report states that "compliance with federal standards is not to be a defense or *otherwise to affect the rights* of parties under common law." H.R. Rep. No. 1776, *supra*, at 24 (emphasis added). The context suggests that the italicized language refers to substantive changes to common law rules rather than the possibility of preemption. Petitioners also note (Br. 29) that Senator Magnuson stated that "[t]he common law on product liability still remains as it was." That statement too is properly understood as explaining that the Act made no change to the substance of product liability law. Finally, petitioners rely (Br. 30-31) on a statement by Representative Dingell that "we have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser." 112 Cong. Rec. at 19,663. Mr. Dingell made that statement to explain why he opposed an amendment that would have criminalized willful violations of federal standards. Thus, the statement indicates only that common law actions based on the violation of federal standards are preserved; it does not indicate that actions that would conflict with federal standards are similarly preserved. See *Wood*, 865 F.2d at 407 n.14.

[17] The recodification included both provisions in 49 U.S.C. 30103 (entitled "Relationship to other laws") but in separate subsections, one entitled "Preemption" (49 U.S.C. 30103(b)) and the other entitled "Common law liability" (49 U.S.C. 30103(e)).

Our interpretation does not render the savings clause meaningless, as petitioners contend (Br. 26-27). Petitioners' argument would have force only if the preemption clause applied to common law claims, a reading that we reject. See *ibid.*; pp. 11-15, *supra*. Instead, our interpretation preserves an important role for Section 1397(k): In cases in which tort liability does not conflict with a federal standard, Section 1397(k) makes clear that compliance with the standard does not immunize a manufacturer from liability. Those cases can arise frequently, since state tort law does not conflict with a federal "minimum standard" (15 U.S.C. 1391(2)) merely because state law imposes a more stringent requirement.[18] For example, Federal Motor Vehicle Safety Standard 105, 49 C.F.R. 571.105, which establishes requirements for brake performance, does not require anti-lock brakes in addition to airbrakes in all vehicles, but the Secretary has not determined that requiring anti-lock brakes would disserve safety. Section 1397(k) makes clear that compliance with Standard 105 is not a defense to a common law tort claim that a vehicle is defectively designed because it lacks anti-lock brakes. Federal Motor Vehicle Safety Standard 125, 49 C.F.R.

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[18] We therefore agree with petitioners (Br. 46-47) that their claims are not preempted merely because the Secretary made airbags one of several design options that manufacturers could choose. We disagree, however, with the contention (Br. 44, 46) that the Secretary provided options because she had no statutory authorization to do otherwise. The Secretary could have imposed performance requirements that effectively required an airbag design. See *Wood*, 865 F.2d at 416-417; 112 Cong. Rec. at 21,487 (Sen. Magnuson) (performance standards expected to affect design). As we explain at pages 23-26, *infra*, the Secretary chose not to do so in order to encourage the provision of a variety of passive restraints, because she determined that would best promote safety. Petitioners' claims are preempted because they would frustrate that policy judgment.

571.125, provides multiple options for the design of reflective devices to warn approaching traffic of the presence of a stopped vehicle, but the Secretary did not determine that the availability of options was necessary to promote safety. Section 1397(k) makes clear that compliance with Standard 125 is not a defense to a common law tort claim that the reflective device is defectively designed unless it uses one rather than another of those options. Thus, under our reading, Section 1397(k) has a sensible and important role.[19]

c. It is petitioners' reading of the clause as preserving tort claims even if they conflict with federal safety standards that would have anomalous results. The Safety Act's purpose "is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. 1381, and Congress chose to carry out that purpose by empowering the Secretary to issue safety standards, 15 U.S.C. 1392, 1397. In some instances, such as the present case, holding a manufacturer liable for what a jury might find to be a design defect would significantly impair the Secretary's efforts to promote safety. Reading the savings clause to preserve that liability from preemption would impermissibly allow courts to second-guess the Secretary's judgment on matters "entrusted to [his] informed discretion" (*Kalo Brick & Tile Co.*, 450 U.S. at 330) and

[19] Petitioners contend (Br. 27 n.11) that there was no need for Congress to specify that compliance with federal standards is not a defense to common law liability because every State already provided that compliance with a federal regulation is not a defense to a design defect claim. But even if Congress understood that to be the common law rule, it could not be certain that rule would not change. It therefore had ample reason to assure that the Safety Act would not be construed to create a new, automatic federal defense.

lead the Act "to destroy itself" (*AT&T*, 524 U.S. at 228).

For example, the Secretary has established windshield retention requirements in Federal Motor Vehicle Safety Standard 212, 49 C.F.R. 571.212, in order to prevent occupants from being thrown from their cars in crashes. If manufacturers could be held liable under state tort law on a theory that it is a design defect for windshields in those vehicles to be retained in a crash because passengers could be injured if they struck the windshields, it would be impossible for manufacturers to comply with both the federal standard and the duties imposed by state tort law. Thus, if the tort claims were not preempted, the Secretary would have to rescind the federal standard, or manufacturers would have to continue to produce windshields that do not eject in order to comply with Standard 212, while paying tort judgments based on the theory that the federally mandated failure of the windshields to release in a crash rendered their cars defectively designed. There is no indication that Congress intended that startling result.

2. a. This case does not pose that type of conflict, but it poses a closely related one. In issuing the version of Standard 208 in effect when petitioners' car was manufactured, the Secretary rejected a rule requiring airbags in all cars in favor of a rule encouraging manufacturers to offer a variety of passive restraints. The Secretary determined—based on the history of consumer (and congressional) responses to passive restraint requirements—that diversity would best promote safety by helping to ensure public acceptance of passive protection systems,[20] encouraging the de-

[20] In 1972, the Secretary adopted a rule requiring an interlock mechanism preventing engine ignition unless manual seatbelts

velopment of new and improved technologies,[21] and enabling the agency to acquire more data to make regulatory decisions. See 49 Fed. Reg. at 28,987-28,997, 29,000-29,001. The Secretary also determined that the high replacement costs of airbags could cause some consumers to decline to replace them after they were deployed, which would leave occupants without passive protection. *Id.* at 29,000-29,001. At the same time, the Secretary took steps that she reasonably determined would prompt manufacturers to install airbags in *some*

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were fastened. That rule provoked a strong public reaction, prompting Congress to ban the interlock requirement and impose procedural limitations on the agency's future efforts to require restraints other than seatbelts. Motor Vehicle and School Bus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1482 (codified at 15 U.S.C. 1401(b) (1988)). Given the public's adverse reaction to the interlock system, one factor the Secretary properly considered was the public's willingness to accept various passive restraint technologies. 49 Fed. Reg. at 28,987. See *Pacific Legal Found.* v. *DOT*, 593 F.2d 1338, 1345-1346 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979). "Airbags engendered the largest quantity of, and most vociferously worded, comments" during the rulemaking. 49 Fed. Reg. at 29,001. Commenters expressed concerns that the chemical used to inflate airbags would be hazardous, that airbags would deploy inadvertently and thereby cause injury, and that airbags would not deploy during an accident. *Ibid.* Given those widespread concerns, the Secretary concluded that "[i]f airbags were required in all cars, these fears, albeit unfounded, could lead to a backlash affecting the acceptability of airbags. This could lead to their being disarmed, or, perhaps, to a repeat of the interlock reaction." *Ibid.*

[21] The Secretary determined that experience could show that automatic seatbelts would be used more frequently than anticipated, and that manufacturers might develop better and more acceptable automatic seatbelt systems. That development could result in automatic seatbelts that were as effective as airbags but cost less. The Secretary also concluded that requiring airbags in all cars would unnecessarily stifle further innovation in occupant protection systems. 49 Fed. Reg. at 29,001.

of their cars. See p. 5 & n. 5, *supra*. Standard 208 thus embodies the Secretary's policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car.

That policy of affirmatively encouraging diversity would be frustrated if manufacturers could be held liable for not installing airbags. If, when the Secretary promulgated the rule in 1984, respondent and other manufacturers had known that they could later be held liable for failure to install airbags, the prospect of sizable compensatory and punitive damage awards, combined with the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," S. Rep. No. 1301, *supra*, at 12, would likely have led them to install airbags in all cars. That outcome would have eliminated the diversity that the Secretary found necessary at that time to promote motor vehicle safety. At the very least, holding manufacturers liable for not installing airbags would have "interfere[d] with the methods by which [Standard 208] was designed to reach [its] goal." *Ouellette*, 479 U.S. at 494.[22] Therefore, tort claims like

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[22] Petitioners mistakenly argue (Br. 16, 44) that their tort claims would not interfere with the Secretary's chosen methods because, they assert (Br. 2, 10-11), the Secretary intended tort liability to provide an incentive for manufacturers to install airbags. In support of that assertion, petitioners cite the Secretary's statement that "potential liability for any deficient systems" would discourage manufacturers from "us[ing] the cheapest system to comply with an automatic restraint requirement." 49 Fed. Reg. at 29,000. Petitioners misunderstand the Secretary's statement, which meant that manufacturers could face tort liability if they installed defective passive restraints. The Secretary did not mean that manufacturers could be held liable for choosing one type of passive restraint rather than another. Petitioners' amici (Missouri Br. 6; Ass'n of Trial Lawyers Br. 29) also mistakenly rely on a

petitioners', which are based on the theory that a car (subject to the version of Standard 208 in effect in 1987) was defectively designed because it lacked an airbag, "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of [Standard 208]." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

For those reasons, the Secretary has long taken the view that Standard 208 preempts such claims.[23] See U.S. Amicus Br. at 28-29, *Freightliner Corp.* v. *Myrick*, *supra*; U.S. Amicus Br. at 11-15, *Wood* v. *General Motors Corp.*, *supra*. That view is consistent with this Court's decisions holding that when Congress or an agency determines that certain activity must be permitted in order to further the purposes of federal law, state law that would forbid that behavior is preempted. See, *e.g.*, *Barnett Bank* v. *Nelson*, 517 U.S. 25, 31 (1996); *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 154-155 (1982); *Kalo Brick & Tile Co.*, 450 U.S. at 326.

The Secretary's view is entitled to substantial weight. "Because the [Department of Transportation] is the federal agency to which Congress has delegated its authority to implement the [Safety] Act, the [Secretary] is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to

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public comment that the Secretary summarized in the description of comments in the preamble. 49 Fed. Reg. at 28,972. An agency does not endorse a comment merely by describing it.

[23] Not all tort claims involving airbags would be preempted. A claim that a manufacturer installed an airbag that deployed improperly would not be preempted because it would not frustrate the purposes of Standard 208. Even a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car because of other design features particular to that car (see Nat'l Conf. of State Leg. Br. 12) would not necessarily frustrate Standard 208's purposes.

the accomplishment and execution of the full purposes and objectives of Congress.'" *Medtronic*, 518 U.S. at 496; *id.* at 506 (Breyer, J., concurring) (administering agency has "special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives").[24]

b. Petitioners mistakenly contend (Br. 16, 47-48) that their claims do not conflict with the Secretary's goal of allowing consumers to adjust to new airbag technology because tort liability would not lead manufacturers to change their conduct. To the contrary, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct."

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[24] Petitioners and their amici contend (Pet Br. 40-41, 49-50; Nat'l Conf. of State Leg. Br. 24-25; Leflar Br. 21-22) that there can be no implied conflict preemption here because, when the Secretary adopted Standard 208, she neither plainly stated her intent to preempt tort liability nor provided notice and comment on the question. That contention rests on a misunderstanding of the basis for conflict preemption. Unlike field preemption, which arises when agencies "intend for their regulations to be exclusive," *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985), conflict preemption arises not from a specific intent to preempt but from the direct operation of the Supremacy Clause, which mandates that state law yield to federal law when they conflict. See p. 17, *supra*. Here, because conflict preemption is at issue, neither a statement of preemptive intent nor notice and comment on preemption was required. For the same reasons, the argument that the Secretary lacks authority to give any particular federal standard preemptive force (Nat'l Conf. of State Leg. Br. 24) is wide of the mark. We do not contend that petitioners' claims in this case are preempted because the Secretary decided that Standard 208 should preempt common law liability. We contend that the claims are preempted because they conflict with, and would frustrate implementation of, the policy judgment embodied in the Standard that a choice of passive restraints would best promote safety.

Garmon, 359 U.S. at 247. Indeed, petitioners' amici acknowledge that tort law "has a deterrence function." Nat'l Conf. of State Leg. Br. 14; see Ass'n of Trial Lawyers Br. 10-12; Leflar Br. 12-13, 17; Missouri Br. 6, 13.[25]

Petitioners also argue (Br. 16, 47-48) that, if manufacturers had changed their conduct and installed airbags, they would have promoted public acceptance of those devices. That may be true, but the Secretary reasonably determined at that time that experience with a variety of passive restraints would best promote public acceptance. In any event, speculation of the sort advanced by petitioners cannot displace the Secretary's reasonable conclusion that claims such as petitioners' would thwart the purposes behind Standard 208.[26]

Petitioners further err in contending (Br. 48-49) that their claims do not conflict with the goal of encouraging innovation and development of more effective restraint

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[25] That tort law also has other purposes (such as compensation) does not mean tort rules cannot conflict with federal law (Nat'l Conf. of State Leg. Br. 14-15; Leflar Br. 17-19). Conflict preemption flows from the effects of the state law, not its purposes. See *Gade* v. *National Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 105-106 (1992).

[26] Petitioners suggest (Br. 16, 44) that a tort rule requiring airbags is consistent with Standard 208 because the Secretary determined that airbags were technologically the most effective passive restraint and provided an incentive to encourage manufacturers to install them (see note 5, *supra*). That contention overlooks the Secretary's conclusion that airbags would *not* be effective *in practice* if they were installed in all cars because of the likely public reaction and potential safety dangers in small cars. It also overlooks the Secretary's determination that further research and development could lead to more cost-effective restraints. And it overlooks the Secretary's reason for providing the incentive to install airbags—to ensure a variety of passive restraints, not to maximize the number of cars with airbags.

systems. Contrary to petitioners' suggestion, the question is not whether tort liability in general stifles innovation but whether liability for failure to install airbags would have done so. The Secretary determined that it would, because of the potential for large damage awards and the "centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States," S. Rep. No. 1301, *supra*, at 12. This Court should decline petitioners' invitation to second-guess that reasonable determination.

Finally, petitioners argue (Br. 44-45) that their claims do not conflict with Standard 208 because their car was manufactured during the phase-in period (when Standard 208 required the installation of some type of passive restraint system in some, but not all, cars) and their car did not have any passive restraint. Those facts do not, however, alter the preemption analysis, because petitioners do not claim that their car was defectively designed because it lacked *any* type of passive restraint. Rather, they claim that the car was defectively designed because it lacked one particular type of passive restraint—an airbag. See Pet. i; Pet. Br. i. Thus, petitioners cannot prevail without a ruling that a car manufactured in 1987 was defectively designed unless it had an airbag. For the reasons we have described, that ruling would conflict with the Secretary's determination that no particular type of passive restraint should be required in any car because the use of a variety of passive restraints would best promote safety.[27]

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[27] This Court therefore need not decide whether Standard 208 would preempt a claim that a car manufactured during the phase-in is defective if it lacks any passive restraint. The Secretary believes that it would preempt such a claim, because the claim would frustrate the safety purposes for which the Secretary adopted the phase-in. See note 6, *supra*. A tort rule that effec-

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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tively required passive restraints in all cars during the phase-in would likely have resulted in the nearly exclusive use of automatic seatbelts rather than airbags and impeded the development of data about the benefits of passive restraints that could help prevent a public backlash against them. See 49 Fed. Reg. at 28,999-29,000. Contrary to petitioners' contention (Br. 45), the fact that the claim involved a car manufactured in 1987 or a crash that occurred after the phase-in would not save the claim from preemption. The relevant question is not what manufacturers would do after the jury verdict in question but what they would have done when the relevant version of Standard 208 was promulgated if they had anticipated that they could later be held liable.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

ALEXIS GEIER, ET AL.,

Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC., ET AL.,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF ROBERT B LEFLAR, ROBERT S. ADLER, MICHAEL GREEN, AND JOSEPH A. PAGE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

Robert B Leflar, Robert S. Adler, Michael Green, and Joseph A. Page are legal scholars who have published articles on the products liability issues to be addressed in this case. They have all been advocates, in various public forums, of the rights of consumers to recover for injuries suffered as a result of the use of defective products. They all depend, in their professional work as teachers and authors and in their private capacity as participants in public debate, on information developed through state-law-based civil litigation. However, none of them has any pecuniary stake in the outcome of this action.

Mr. Leflar is Professor of Law at the University of Arkansas School of Law. Mr. Adler is Professor at Kenan-Flagler School of Business, University of North Carolina. Mr. Green is Professor of Law at the University of Iowa College of Law. Mr. Page is Professor of Law at Georgetown University Law Center.

Amici submit this brief for three reasons. (1) They are concerned that the judgment of the Court of Appeals, if affirmed, would result in a serious erosion of the rights of injured parties to obtain compensation, contrary to the intent of Congress, in enacting motor vehicle safety and other consumer protection laws, not to affect such rights. (2) They are concerned that the preclusion of state-law damage claims resulting from a broad preemption holding

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, *amici* state that counsel for neither party authored this brief in whole or in part, and that no person or entity, other than *amici*, made any monetary contribution to the preparation or submission of this brief.

would impoverish the public's store of important safety and health information, which has been significantly augmented by the products liability litigation process. (3) They hope to bring to the Court's attention lines of argument not well developed in preemption litigation to date: the noncongruence between state and federal interests in vehicle safety improvements, and the barriers to advocacy of the States' separate interests in the federal administrative rulemaking proceedings at issue here.

STATEMENT OF THE CASE

This case presents the question of whether the U.S. Department of Transportation's decision to proceed gradually in phasing in a *regulatory* requirement that motor vehicle manufacturers incorporate a cost-effective safety feature – automatic passive restraints – in their products forecloses state-law *damage claims* by seriously injured consumers that more rapid adoption by manufacturers of the safety feature would have prevented or mitigated their injuries. The Court of Appeals held that such state-law claims are impliedly preempted by conflict with the federal regulation. However, as the highest courts of six states have concluded, Congress has expressly preserved these state-law claims. To expand implied preemption doctrine to permit a federal regulation, adopted without notice or opportunity to comment on any prospective vitiating effect on state common law, to bar injured consumers from all remedy would undercut the nation's federalist structure and deprive the public of the chance to participate in what is a fundamentally political decision.

Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (the "Safety Act"), to "reduce traffic accidents and deaths and injuries to persons

resulting from traffic accidents." *Id.* § 1381 (now codified at 49 U.S.C. § 30101).[2] The Safety Act charged the Department of Transportation and its component agency, the National Highway Traffic Safety Administration (NHTSA), with pursuing this goal, in part, by promulgating motor vehicle safety standards. These standards are defined in the Safety Act as "a minimum standard for motor vehicle performance or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." *Id.* § 1391(2).

The standard at issue in this case, Federal Motor Vehicle Safety Standard (FMVSS) 208, was promulgated by NHTSA in response to this Court's decision in *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983). In *State Farm*, the Court overturned as arbitrary and capricious NHTSA's 1982 rescission of an automatic passive restraint standard. The Court concluded: "[G]iven the judgment made [by NHTSA] in 1977 that airbags are an effective and cost-beneficial life-saving technology, the mandatory passive-restraint rule may not be abandoned without any consideration whatsoever of an airbags-only requirement." 463 U.S. at 51.

On remand from the *State Farm* case, NHTSA concluded that "the most effective [passenger restraint] system is an airbag plus a [manual] lap and shoulder belt." 49 Fed. Reg. 28962, 28986 (1984). However, in revising FMVSS 208 in 1984, the agency chose to phase in an automatic passive restraint requirement gradually, and to encourage but not mandate the use of airbags. For

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[2] Congress recodified the Safety Act in 1994 "without substantive change." Pub. L. No. 103-272. Since most cases interpreting the Safety Act employ the older codification, this brief will do likewise.

the 1987 model year, the first for which the standard required compliance, each manufacturer had to provide automatic passive restraints (automatic seatbelts or airbags) in "a minimum of 10% of all cars." 49 Fed. Reg. 28999 (1984). Thus, a manufacturer's decision for model year 1987 to equip up to 90% of its fleet with manual seat belts alone, which NHTSA had long deemed inferior in safety performance to the airbag-belt combination, would have met federal minimum standards for the fleet as a whole. In subsequent years a greater percentage of the fleet was obliged to contain automatic restraints, until the restraints became obligatory for all cars made after September 1, 1989. (The standard was to be revoked if three-fourths of the nation's population came under qualified state mandatory-seatbelt laws, a condition that never materialized.)

Alexis Geier was driving her 1987 Honda Accord in the District of Columbia in 1992 when she ran into a tree. She was wearing the manual lap belt and shoulder harness with which the vehicle was equipped. However, she sustained serious injuries that petitioners claim would have been prevented or mitigated had Honda equipped the vehicle with an automatic passive restraint not required by federal law but nevertheless technologically feasible and cost-effective: an airbag.

Petitioners' claims, based on District of Columbia common-law theories of negligence, breach of warranty, and strict liability, are in the mold of a case in the pantheon of tort: *The T.J. Hooper*, 60 F.2d 737 (2d Cir.), cert. denied, 287 U.S. 662 (1932). In both cases, plaintiffs claimed that a feasible, cost-effective safety device, if incorporated into their means of conveyance, would have prevented harm. In both cases, trade custom had not yet generally adopted the safety device at issue, but a firm with foresight had

recognized its worth. (In *The T.J. Hooper*, Judge Hand noted that "[o]ne line alone" had placed radio receivers on its tugboats, 60 F.2d at 739; in this case, NHTSA observed in 1984 that "one manufacturer has already begun to offer airbags and three others have indicated plans to do so." 49 Fed. Reg. at 28997.) *The T.J. Hooper* established the principle that "a whole calling may have unduly lagged in the adoption of new and available devices," 60 F.2d at 740, subjecting its members to liability. Petitioners' claims are ensconced in the heartland of American tort law.

The district court, however, granted summary judgment for respondents on the ground that the Geier's claims were preempted by the Safety Act and FMVSS 208. The Court of Appeals affirmed. *Geier v. American Honda Motor Co.*,166 F.3d 1236 (D.C. Cir. 1999). The Court of Appeals held that petitioners' claims were impliedly preempted by Standard 208, because "allowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department [of Transportation]'s policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." 166 F.3d at 1243.

SUMMARY OF ARGUMENT

The National Traffic and Motor Vehicle Safety Act does not expressly preempt design defect claims such as petitioners'. The express preemption provision of the Safety Act, 15 U.S.C. § 1392(d), when read together with the Act's claims preservation provision, § 1397(k), compels the conclusion that Congress intended to preempt only state safety standards established by statute or regulation and non-identical with corresponding federal standards, while preserving all common-law damage claims.

Sections 1392(d) and 1397(k) might reasonably be viewed as disposing of implied preemption arguments as well. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). However, the Court of Appeals in this case read *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), as permitting implied conflict preemption analysis. Assuming *arguendo* that such an inquiry is permitted after *Cipollone* and *Freightliner*, the Court should nevertheless find that FMVSS 208 does not impliedly preempt petitioners' claims.

First, the scope of implied conflict preemption in products liability cases should be narrowly circumscribed. Products liability, a field of law developed almost entirely by the states, is unquestionably a realm to which the presumption against preemption relied on in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), and many other cases should apply. No clear congressional statement in the Safety Act rebuts this presumption.

Historical and prudential considerations support a narrowly cabined implied preemption doctrine that allows for the coexistence of federal administrative regulation and state tort law. In enacting the consumer protection laws of the 1960s and 1970s, Congress assumed the continued existence of state tort law, including the traditional doctrine that compliance with government safety standards constitutes *nonconclusive* evidence of due care. Permitting this traditional tort regime to continue can partially ameliorate various limitations of administrative agencies, such as their susceptibility to political pressure, their limited resources and attention spans, and their limited ability to obtain information that regulated industries have an interest in suppressing.

Second, petitioners' claims are compatible with the letter and purposes of FMVSS 208; no conflict of a claim-preclusive

nature exists in this case. Respondents could have equipped petitioners' vehicle with an airbag and manual seatbelts, complied with the federal standard, and avoided liability. Or respondents could have opted, as they did, to meet the minimum federal standard for fleet safety and taken the business risk of later paying tort damages. There is no indication in this record that awards of damages would have the effect of seriously disrupting the federal regulatory program.

Third, the state interests underlying the bases for petitioners' state-law claims are not congruent with the federal interests underlying FMVSS 208. It is true that the injury-prevention function of state tort law largely overlaps the primary purpose of the Safety Act. But state tort law also encompasses other interests outside NHTSA's purview. Among these state interests that NHTSA determinations fail to safeguard are compensation for injury caused by socially unreasonable conduct; the spreading of risks created by such conduct; the protection of consumer expectations; the taking into account of intangibles such as pain and suffering in the determination of "benefits" for purposes of risk-benefit analysis; and the educative function of tort law.

Finally, the federal system tolerates the coexistence of these varying federal and state interests, and allows their expression in forums other than the federal administrative rulemaking process. This is particularly the case when that process, as here, gave no notice to the citizenry of the possibility that the federal standard under consideration might undermine a sizeable portion of traditional tort law – claims based on the intellectual heritage of *The T.J. Hooper*.

Proponents of a regulatory compliance defense in vehicle

design matters have the opportunity to make their case through the normal political process, in Congress and in state legislatures, as well as in courts interpreting state law. Opponents of claim-preclusive rules, however, did not have the opportunity to make their case in the sole forum respondents would allow them: the 1984 NHTSA rulemaking. No one conceived at the time that preclusion of state-law claims might even be at stake.

When Congress has not clearly authorized preemption of state-law damage claims outside federally occupied fields, and no agency dictate has rendered the basis of a state-law claim directly contradictory of the federal rule, courts should reject preemption arguments unless, at the least, the agency has concluded after notice and opportunity to comment that preemption is necessary to advance the regulatory program's goals. Any doctrine less respectful of state interests would skew the proper balance of power between Washington and the states, and would stifle the public's voice in matters critically affecting their rights.

ARGUMENT

I. The National Traffic and Motor Vehicle Safety Act Does Not Expressly Preempt Petitioners' Claims.

The Safety Act contains a preemption provision and a savings, or claims preservation, provision. They must be read together to determine the extent to which Congress intended that state law be displaced. The preemption provision states:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). The claims preservation provision states: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from *any common law liability.*" *Id.* § 1397(k) (emphasis added).

The clearest way of reconciling these two provisions is that Congress meant to preempt state safety standards established by statute or regulation, unless they are identical to corresponding federal standards, while preserving all common-law damage claims. Within the universe of claims preserved are those left viable under the general common-law principle that compliance with a relevant safety statute or regulation is evidence of due care, but not an absolute defense. *See Restatement (Second) of Torts* § 288C (1965).

The logic and legislative history supporting this conclusion are well explained in decisions of the highest courts of six states: *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 6-8 (Tex. 1998); *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376, 379-82 (N.Y.1998); *Minton v. Honda of America Mfg., Inc.*, 684 N.E.2d 648, 655-57 (Ohio 1997); *Munroe v. Galati*, 938 P.2d 1114, 1117 (Ariz. 1997); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345, 347-48 (N.H.1995), cert. denied, 516 U.S. 1072 (1996); and *Wilson v. Pleasant*, 660 N.E.2d 327, 330 (Ind.1995). *See also* Ralph Nader & Joseph A. Page, *Automobile-Design Liability and*

Compliance with Federal Standards, 64 Geo. Wash. L. Rev. 415, 419-26 (1996). In this brief, rather than rehearsing the arguments further, we proceed on the assumption that express preemption does not apply.

II. Federal Motor Vehicle Safety Standard 208 Does Not Impliedly Preempt Petitioners' State Law Claims.

The express preemption and claims preservation provisions of 15 U.S.C. §§ 1392(d) and 1397(k), quoted above, might reasonably be viewed as disposing of implied preemption arguments as well. As this Court concluded in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992),

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," . . . "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

505 U.S. at 517 (citations omitted).

However, in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), this Court stated in dictum that a clause expressly defining the preemptive reach of a statute "supports a reasonable inference" that Congress did not intend to preempt other matters, but does not "entirely foreclose[] any possibility of implied pre-emption." *Id.* at 288-89. *Freightliner* did not address the effect of the statute's savings or claim preservation clause; taking that clause into account,

the "reasonable inference" that implied preemption arguments are invalid is all the stronger. Nevertheless, the Court of Appeals in this case read the passage from *Freightliner* quoted above to permit an implied conflict preemption analysis of petitioners' claims. 166 F.3d at 1241-42. Therefore, in the remainder of this brief, we address the implied conflict preemption issue.

A. The Scope of Conflict Preemption in Products Liability Cases Should Be Narrowly Circumscribed.

As this Court reiterated in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the nation's federal structure has long counselled the courts that absent a clear indication to the contrary, Congress does not intend to invade the sovereign states' "historic primacy" in the regulation of matters of health and safety. 518 U.S. at 485. The field of products liability, developed almost entirely by the states, is unquestionably a realm of law to which this presumption against preemption applies most strongly. But as noted by the state supreme courts listed above, nowhere does the Safety Act reveal the kind of "clear and manifest" congressional purpose to preempt, *Medtronic*, 518 U.S. at 485, that is necessary to overcome the inference that the States' carefully constructed jurisprudence of tort remains intact. Federalism concerns therefore counsel that the scope of implied preemption, if recognized at all, should be narrowly confined.

Historical considerations support this conclusion. The consumer protection laws of the 1960s and the 1970s regulating motor vehicles, drugs, medical devices, and consumer products were enacted against a backdrop of the imposition of serious hazards on the public by manufacturers of defective products. Although products liability law was coming into its own, *see*

Restatement (Second) of Torts § 402A (1965), Congress concluded that the discipline of the marketplace, backed by state-law civil remedies, provided insufficient protection for the public. Therefore Congress erected various regulatory structures to supplement private law, typically providing expressly for the preservation of existing civil remedies. *See* Robert B Leflar & Robert S. Adler, *The Preemption Pentad: Federal Preemption of Products Liability Claims After* Medtronic, 64 Tenn. L. Rev. 691, 746-47 (1997).

The Safety Act is representative of these consumer protection laws that contemplated a dual role for administrative regulation and tort law. The Act's primary stated purpose is to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. Congress's charge to NHTSA was to pursue this goal by issuing and enforcing safety standards that are "reasonable, practicable, and appropriate." *Id.* § 1392(f)(3). But the pursuit of reasonable, practicable accident reduction measures through the operation of liability avoidance incentives is one, though by no means the only, goal of tort law as well. It would be an unusual logic that would readily interpret a law aimed at enhancing safety simultaneously to countenance the withdrawal of a chief incentive for achieving it.

Prudential considerations also counsel a narrow scope for implied preemption. Federal regulatory agencies such as NHTSA suffer from various limitations in carrying out their charges, limitations which the coexistence of tort litigation can partially ameliorate. One such limitation arises from agencies' susceptibility to political pressure, as the tortured history of airbag regulation demonstrates all too well. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 34-40 (1983);

see also Ford Motor Co. v. Stubblefield, 319 S.E.2d 470, 478 (Ga. App. 1984) (admissibility of White House tape of Ford executives asking President Nixon to "'cool it' as to safety requirements"). Agencies may issue and then withdraw safety standards depending on the political winds, but if the tort system is in place the steady pressure of potential liability will provide a constant background incentive for the achievement of reasonable safety.

Another set of regulatory agency limitations concerns limited agency resources and attention spans. Information about newly-discovered product risks or more effective safety designs may not come to an agency's attention at the particular juncture at which a regulatory decision has to be made, or the information may be shunted aside in favor of other, more compelling agency priorities. *Cf.* 16 C.F.R. § 1009.8 (Consumer Product Safety Commission policy recognizing that, because of limited resources, the agency cannot address all significant hazards). Moreover, the standard-setting process tends to be sufficiently protracted that technological advances may race ahead of the agency's often deliberate pace.

By contrast, there are some types of information that the tort process excels in unearthing. Manufacturers have been known to exaggerate, in submissions to the agency, the likely costs of proposed safety improvements, and the length of time within which they might feasibly be implemented. Other manufacturers, although regulated, have suppressed evidence of risks involved in their products. The discovery process of civil litigation serves as an accuracy check on this potential for distortion of information critical to public debate.

These historical and prudential considerations counsel that

if implied conflict preemption arguments are to be countenanced at all in the face of express preemption and claim preservation provisions, preemption doctrine's encroachment on state sovereignty and the tort system should be tightly constrained. Two of the *amici* have offered a principle of "dictate preemption" to define the situations in which state-law products liability claims must be preempted by conflicting federal rules:

> If Congress, or a regulatory agency validly exercising delegated authority, dictates that a product must be made, labelled, or marketed in a particular fashion and no other, state-law damage claims alleging injury arising from a product feature complying with that federal dictate must be disallowed.

Leflar & Adler, *supra*, 64 Tenn. L. Rev. at 713. Under this restrained view of conflict preemption, mere federal acquiescence in a manufacturer's adoption of a particular product feature should not require preclusion, as a matter of federal law, of a state-law claim attacking the reasonableness of that feature. *Id.*

B. Petitioners' Claims Are Compatible with the Letter and Purposes of FMVSS 208.

This case does not present a situation where it is "impossible for a private party to comply with both state and federal requirements," *English v. General Electric Co.*, 496 U.S. 72, 79 (1990), so that the state-law claim must fail. There is no direct conflict between petitioners' claims and FMVSS 208. The standard is not a federal dictate that Honda cars must be designed, as

petitioners' was, without automatic passive restraints. Honda could have equipped petitioners' vehicle with an airbag and manual seatbelts, complied with the federal standard, and avoided liability.

Even viewing petitioners' claims as requiring Honda to avoid conduct (designing and selling their vehicle without an airbag) that federal law permitted, the case does not present a conflict of a claim-preclusive nature. Honda could comply with the minimum fleet safety level prescribed by FMVSS 208 as it did, foregoing for the great majority of its 1987 model year fleet the long-term cost-effective automatic passive restraint technology in favor of the short-term pursuit of revenue or market share, and take the risk of later paying tort damages as a business decision. As the Court recognized in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988), "the permission of incidental regulation [in the form of a state-law compensation award to the injured] is consistent with the preclusion of direct regulation" by a state in conflict with federal law. *See also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984); *English v. General Electric Co.*, 496 U.S. 72, 85-86 (1990).

The Court of Appeals held, however, that recognition of petitioners' state-law damage claim was preempted not because simultaneous compliance with state and federal law was impossible, but because a state-law damage award "would stand as an obstacle to the federal government's chosen method of achieving the Act's safety objectives." 166 F.3d at 1241. The "chosen method," a gradual phase-in of requirements for safety devices known to be cost-effective, aimed at "encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." *Id.* at 1243.

Reasonable minds may differ on the merits of NHTSA's choice of method. The question before the Court is not whether NHTSA's phase-in strategy was justified. It is whether state-law damage awards would seriously disrupt the federal regulatory program. The Court of Appeals failed to address this question.

In this case, the record suggests that any disruptive effect would be minimal. At least one "no-airbag" claim had been settled in 1984 for a sizeable sum, *see Burgess v. Ford Motor Co.*, No. DV79-355 (Ala. Cir. Ct. 1984) ($1.8 million settlement), yet that signal of potential future liability apparently did not impel the manufacturer to equip its fleet with airbags at a rate faster than the agency thought the public would accept. Moreover, by the time injuries involving 1987 model year cars resulted in litigation reaching the point of damage awards or even settlement negotiations, the three-year phase-in period would typically have already passed (as in this case), so that damage payouts would not likely impel manufacturers to take actions that were not already required by federal regulation. To the extent that the *prospect* of tort liability (and accompanying adverse publicity) *would* motivate auto makers to equip their vehicles with airbags sooner than federally required, that result would reinforce, not frustrate, a chief aim of FMVSS 208, which was to encourage wider use of airbags. *See* 49 Fed. Reg. at 29000-01 (giving "extra credit" toward manufacturers' fleet percentage requirements for choosing airbags).

C. The State Interests Underlying the State-Law Bases for Petitioners' Claims Are Not Congruent with the Federal Interests Underlying FMVSS 208.

If federal agency rulemaking fully protected not only the federal interests identified by Congress in the agency's organic statute, but also the state interests underlying applicable state law, then the argument for broad implied conflict preemption might be

strong. The injury-prevention, or deterrence, function of state tort law does largely overlap the primary purpose of the Safety Act. However, the purposes underlying state tort law encompass other interests outside NHTSA's purview in promulgating FMVSS 208 – interests worthy of respect in our federal system.

The prime goal of tort law is compensation for injury caused by socially unreasonable conduct. W. Page Keeton et al., Prosser & Keeton on Torts 6 (5th ed. 1984). But compensation forms no part of NHTSA's charge or concern. And the determination of what is "socially unreasonable" (in this context, what constitutes a defective design) *for purposes of compensating the injured* is a task that Congress has never placed in NHTSA's hands.

Related to tort law's compensation function is its risk-spreading function. *See, e.g., Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring). There is debate about the extent to which risk-spreading policy ought to animate tort law. *See, e.g., Otte v. Dayton Power & Light Co.*, 523 N.E.2d 835, 841-42 (Ohio 1988). But for those states in which risk spreading is a proper goal of tort, it is a goal that NHTSA does not consider in its deliberations.

The state-law determination of whether a motor vehicle is defectively designed has an objective very similar to NHTSA's goal in determining to issue a motor vehicle safety standard that is "reasonable, practicable and appropriate" for the particular type of motor vehicle. 15 U.S.C. § 1392(f)(3). NHTSA employs cost-benefit or risk-benefit analysis in these determinations, and most factfinders in state-law civil actions do the same. *See Restatement (Third) of Torts: Products Liability* § 2(b) & Reporters' Note to comment d (1998). In this respect, it is argued that since NHTSA

does essentially the same thing that juries do, and does it more expertly, the agency's conclusions should displace contrary state-law findings.

The contention is a plausible one, and is often advanced (in the form of advocacy of a regulatory compliance defense) in Congress and in state legislatures and courts. Those are the proper forums in which the contention should be raised. For purposes of this case, however, the significant point is that a number of states employ a method of determining design defect that protects a somewhat different interest than that protected by risk-benefit balancing: the interest in upholding consumer expectations. *See, e.g., Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979); *French v. Grove Mfg. Co.*, 656 F.2d 295 (8th Cir. 1981) (applying Arkansas law); *Potter v. Pneumatic Tool Co.*, 694 A.2d 1319 (Conn. 1997); *Ontai v. Straub Clinic & Hosp., Inc.*, 659 P.2d 734 (Haw. 1983); *Kudlacek v. Fiat S.p.A.*, 509 N.W.2d 603 (Neb. 1994); *Lee v. Volkswagen of America*, 688 P.2d 1283, 1285 (Okla. 1984); *Sumnicht v. Toyota Motor Sales*, 360 N.W.2d 2, 16-17 (Wisc. 1984).

Grounded in the law of warranty, the consumer expectations test for design defect focuses attention on manufacturers' representations about product performance. Advertising may lead consumers to believe a product has qualities of safety beyond those that would be required by NHTSA's risk-benefit analysis. States have a justifiable interest in protecting these consumer expectations, and a determination that a NHTSA standard displaces state law could invade that state interest.

Even in states that use risk-benefit analysis in their state-law determinations of design defect, the method of conducting that risk-

benefit analysis may protect interests that NHTSA overlooks. States may assert an interest, for example, in employing a conception of "benefit" that encompasses all factors of value to the state's citizens, including intangibles. The agency in justifying FMVSS 208 conceded that its calculations "would not represent the full benefits of reducing fatalities and injuries because the Department cannot measure the intangible value of a human life or a reduced injury. It cannot adequately measure, for example, the value of pain and suffering or loss of consortium." 49 Fed. Reg. at 28996. But state damage law would allow these intangibles as items of compensable damage, and would implicitly allow factfinders to weigh them in the prior determination of whether the design is defective.

A final state interest that would be undercut by a broad implied preemption doctrine is the interest in the educative function of tort law. The history of modern American public health is strewn with examples of health hazards whose existence or magnitude came to light not chiefly because of federal agency action, but because of tort litigation as an engine of discovery. Illustrations include the Ford Pinto litigation, *see, e.g., Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. App. 1981); asbestos, *see, e.g., Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974), and Paul A. Brodeur, Outrageous Misconduct: The Asbestos Industry on Trial (1985); tobacco, *see Cipollone, supra,* and its progeny; and the Dalkon Shield IUD, *see* Robert S. Adler & Richard A. Mann, *Preemption and Medical Devices: The Courts Run Amok*, 59 Mo. L. Rev. 895, 943-45 (1994). Information developed through tort litigation has enriched the marketplace of ideas and the democratic process, and courts should pause before employing implied preemption doctrine to dam its flow.

D. The Federal System Tolerates the Coexistence of These Varying State and Federal Interests, and Allows Their Expression in Forums Other Than the Administrative Rulemaking Process, Particularly When That Process Gives No Notice of the Possibility of a Preemptive Effect on State Law.

This case essentially presents the question of the proper forum or forums in which decisions about the reasonableness, *for purposes of compensating the injured,* of the timing of automobile safety improvements should be made. The Court of Appeals' approach would confine the decision to a single national forum, the NHTSA rulemaking process (supplemented as it is by congressional oversight). However, the federal structure of the nation suggests that the issues should be thrashed out in other forums as well: in the judiciary, state and federal, applying state law; and to a limited extent, in the state legislatures. This multicentered approach comports best with the "American idea of protecting liberty by fragmenting power." Laurence H. Tribe, American Constitutional Law 20 (2d ed. 1988); *see also Gregory v. Ashcroft*, 501 U.S. 452, 457-59 (1991).

Proponents of claim-preclusive rules, such as respondents, have full and fair access to both the political and the judicial processes at the federal and state levels. They may seek (and have sought) explicit adoption of regulatory compliance defenses before Congress, state legislatures, and state courts of last resort. No such measure has passed both houses of Congress. *See, e.g.,* H.R. 956, 104th Cong., 1st Sess., § 201(f) (1995) (passed by the House but not the Senate). Some states have adopted modified versions of the regulatory compliance defense, for example to raise a presumption of nondefectiveness, *e.g.,* Kan. Stat. Ann. § 60-3304(a), Tenn.

Code Ann. § 13-21-403(1)(b); to preclude liability for drugs meeting FDA standards, *e.g.,* Mich. Comp. Laws § 600.2946(5), *see also Carlin v. Superior Court,* 920 P.2d 1347, 1352-53 & n.4 (Cal. 1996) (no liability for failure to provide drug warning that FDA had expressly rejected); or to preclude punitive damages for such drugs, *e.g.,* Ariz. Rev. Stat. Ann. § 12-701; Or. Rev. Stat. § 30.927. This political history is a model of the creative role of the federal structure. *Cf. New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (states as laboratories of experimentation).

Opponents of claim-preclusive rules, however, lacked the opportunity to make their case in the single national forum upon whose decision the implied preemption argument in this case is based. In all the extensive rulemaking process by which FMVSS 208 was developed over the years, not once was notice given that the standard might have the effect of undermining a sizeable portion of traditional tort law – claims based on the intellectual heritage of *The T.J. Hooper.* Advocates and beneficiaries of the various state interests identified above – state attorneys general, media, consumer representatives – had no chance to respond to defend those interests.

The lack of notice of FMVSS 208's possible claim-preclusive effect on state law is unsurprising: before the *Silkwood* litigation, the notion that federal safety rules might entirely displace aspects of state tort law had scarcely been broached. NHTSA itself in 1984 appears to have assumed the continued availability of tort remedies against manufacturers of defective restraint systems. *See* 49 Fed. Reg. at 29000 ("[the agency] believes that competition, potential liability for any deficient systems and pride in one's product would prevent [manufacturers from only using the cheapest

restraint systems]").

We do not suggest that the lack of notice in the FMVSS 208 rulemaking process of the standard's possible preemptive effect in any way tainted that process, for administrative law purposes. Nor do we suggest that an agency rule cannot have claim-preclusive effect on state law, even absent notice regarding such effect during the rulemaking process, in federally occupied fields of law, or when Congress has authorized preemption if the federal rule entirely "cover[s] the subject matter" addressed by a state-law damage claim. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 675 (1993).

Our contention, rather, is this. When Congress has not clearly authorized preemption of state-law damage claims outside federally occupied fields, and no agency dictate has rendered the basis of a state-law claim directly contradictory of the federal rule, courts should reject preemption arguments unless, at the least, the agency has concluded after notice and opportunity to comment that preemption is necessary to advance the regulatory program's goals. Any doctrine less respectful of state interests would skew the proper balance of power between Washington and the states, and would stifle the public's voice in matters critically affecting their rights. The proposition that federal regulations are to deprive Americans of their common-law remedies ought in principle to be tested by public debate in the political process, rather than imposed on the nation by the federal judiciary.

CONCLUSION

The Court of Appeals' decision finding that petitioners' claims are preempted should be reversed.

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from both parties granting consent to the filing of this brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyers primarily represent injured plaintiffs in civil actions. State law has traditionally

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

afforded a remedy in tort by which those victims may seek fair compensation from wrongdoers.

Increasingly, those who may be defendants in state tort actions seek refuge in the doctrine of federal preemption. In too many instances, immunity from state law is urged by those whose objective is immunity from any accountability, where Congress has not provided an alternative means for legal redress. ATLA views the decision below as leading to an unwarranted denial of Americans' fundamental right to legal recourse for injury.

SUMMARY OF THE ARGUMENT

1. The decision of the lower court that the compliance with Motor Vehicle Standard 208 immunizes automakers from product liability based on failure to install airbags is based on a fundamental misunderstanding of the operation of product liability lawsuits. A verdict in a product liability action is not the functional equivalent of a state regulation requiring airbags in cars.

A verdict for plaintiff in such common law cases requires only that the defendant compensate the plaintiff for injuries. Verdicts are not accompanied by any order or requirement that the defendant modify its product. Nor does a plaintiff's verdict force the defendant to choose between changing the product's design or facing massive liability. Each jury assesses the reasonableness of a car's design under the individual circumstances existing when the automobile was manufactured. A plaintiff's verdict does not relieve any subsequent plaintiff from the burden of proving each element of the tort action.

2. This Court should establish a guidepost for courts facing the decision whether federal safety regulations preempt tort actions traditionally available under state law. Unless an express preemption provision clearly and unambiguously indicates Congress' intent to preempt common law remedies,

courts should presume that Congress intended that these remedies to coexist with federal regulations.

Such a presumption a conforms to the traditional and historical view that liability and regulation are complementary means of promoting safety and that regulations serve as a floor, not a ceiling. Although product liability exerts an influence on the decisions of manufacturers, this market-based incentive is not the type of direct exercise of state authority that would conflict with federal regulation.

In addition, requiring Congress to speak plainly when it intends to eliminate state common law remedies allows states to protect their interests through congressional representation and would safeguard the fundamental right of Americans to access to legal recourse for wrongful injury.

3. The lower court erred in finding that the express preemption of state "standards" applies to product liability actions. The plain language of the statute characterizes federal standards as "minimum." Plaintiff's causes of action alleging negligent design, strict liability and breach of warranty focus on whether the automaker acted unreasonably under the circumstances existing at the time. Such a cause of action does not establish objective criteria for the performance of the car. Finally, the savings clause does not conflict with the preemption provision, but makes clear Congress' intent to preserve product liability actions such as plaintiff's.

4. The lower court erred in holding that product liability remedies stand as an obstacle to federal purposes and objectives. Courts should rarely engage in "object" preemption in areas traditionally committed to state, rather than national authority.

Potential product liability, far from frustrating the purposes and objectives of Standard 208, was relied on by NHTSA to spur adoption of airbags.

ARGUMENT

I. THE DECISION THAT PLAINTIFF'S COMMON LAW CAUSES OF ACTION WERE PREEMPTED BY THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT WAS BASED ON AN ERRONEOUS VIEW OF PRODUCT LIABILITY LAW.

The lawmakers who drafted, debated and ultimately enacted the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq*., ["Safety Act"] surely are entitled to scratch their heads. Highly publicized hearings cast a spotlight on the "soaring rate of death and debilitation on the Nation's highways." S. Rep. No. 1301, 89th Cong., 2d Sess. 1 (1966). They included a memorable appearance by consumer advocate Ralph Nader, whose recent book, "Unsafe At Any Speed" castigated the auto industry for neglecting the problem of the "second collision" and crashworthiness. Without a dissenting vote, Congress authorized the Secretary of Transportation to establish federal motor vehicle safety standards. Congress' sole stated purpose was to " reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. §1381.

To avoid subjecting automakers to a multiplicity of requirements, Congress included a preemption provision which was narrowly limited to state safety standards:

> **Supremacy of federal standards . . .**
> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish or continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard.

15 U.S.C. § 1392(d).

Although it had already defined federal safety standards as "a *minimum* standard for motor vehicle performance," 15 U.S.C. §1391(2)(emphasis added), Congress added a savings clause that removes any doubt that automakers would continue to be subject to liability suits:

> **Continuation of common law liability**
> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. §1397(k).

Lawmakers might well be perplexed, therefore, by the decision by the lower court in this case that Honda's compliance with Safety Standard 208 does indeed exempt it from common law liability. Lawmakers might agree with Arizona Chief Justice Feldman that it "is difficult to imagine just what language Congress could have used to make the point more clear." *Munroe v. Galati*, 189 Ariz. 113, 938 P.2d 1114, 1119 (1997).

This case is the latest in a string of similar federal circuit court decisions. Each found the preemption of state "safety standards" to be irreconcilable with the preservation of common law liability. *See Wood v. General Motors Corp.*, 865 F.2d 395, 402 (1st Cir. 1988); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Taylor v General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1415 (9th Cir. 1997).

ATLA suggests that the fault lies not in Congress, but with those courts. A common element in these decisions is a fundamental error that is encapsulated by the bare assertion by the court below: "On its face, moreover, the term 'standard' in § 1392(d) could apply to the *requirements imposed by common law tort verdicts*." Pet. at App. 9.

(emphasis added). In the court's view, a tort verdict would operate to require an automaker to install airbags in its cars, the functional equivalent to a state statute or regulation. Pet. at App. 8. *See also Wood*, at 408 (verdict would be equivalent to a state statute requiring all vehicles registered in the state to have passive restraints); *Taylor,* at 824 n.16 ("the effect would be similar to that produced by a state regulation requiring automobiles to be equipped with airbags"); *Kitts,* at 789 (allowing a common law action "would be tantamount to establishing a conflicting safety standard").

On the contrary, ATLA submits, the only requirement imposed by a product liability judgment is the obligation to compensate the plaintiff for the injury caused. This Court has suggested that it would "be rare indeed for a court hearing a common- law cause of action to issue a decree that has 'the effect of establishing a substantive requirement for a specific device.'" *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 503 (1996). Indeed, common law causes of action by definition do not provide such injunctive relief, *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1249 (N.J. 1990). ATLA has been unable to locate an instance in which a common law product liability damage verdict was accompanied by an order that defendant alter its product. For example, in *National Women's Health Network v. A.H. Robins Co.,* 545 F. Supp. 1177, 1181 (D. Mass. 1982), the court held that there was no basis under state product liability law to order defendant to recall its allegedly defective IUD in addition to awarding damages, adding: "No court has ever ordered a notification and recall campaign on the basis of state law."

Should a court attempt to issue an injunction requiring the installation of airbags, such an action would clearly be preempted. But a verdict and judgment in a common law action for damages does not require the defendant to do anything with respect to the product. The manufacturer remains as free as before to decide whether to modify its product or to leave the design unchanged. The

latter option leaves open the possibility that another consumer might be similarly injured and bring a successful damage suit. However, that is precisely the position the manufacturer occupied prior to the first lawsuit. No discernible requirement has been imposed under state law. Ralph Nader and Joseph A. Page, *Automobile-Design Liability And Compliance With Federal Standards* 64 Geo. Wash. L. Rev. 415, 437-39 (1996). *See Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1540-41 (D.C. Cir. 1984).

It is equally erroneous that "[a] successful no-airbag claim would mean that an automobile without an airbag was defectively designed." Pet. at App. 14, leaving the automaker with the choice of either installing airbags in its cars or facing massive liability claims. A jury verdict for plaintiff in this case may boost the confidence of plaintiffs with similar claims, but it does not relieve any subsequent plaintiff of the burden of proving each element of their causes of action. The first verdict does not confer any legal advantage on subsequent claimants so as to result in a flood of verdicts. Indeed, most manufacturers report that they did not change their product design in response to product liability litigation, though a majority undertook some measures to improve safety.[2]

Moreover, each plaintiff asserting liability based on the absence of airbags must establish the unreasonableness of the particular car's design in view of the circumstances existing at the time it was marketed. A successful claim in this case would mean only that the jury found the design of plaintiff's car was unreasonably dangerous in view of the

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[2] Risk managers of Fortune 1000 corporations with actual product liability experience reported that as a result (1) over 35% had improved their product warnings and/or instructions; (2) over 30% had improved the safety of their designs and (3) 65% had established formal safety objectives. E. Patrick McGuire, The Impact of Product Liability 18 (Conference Bd. 1988), summarized in W. Page Keeton et al. , Products Liability and Safety--Cases and Materials 1033-34 (2d ed. 1989).

foreseeable risk of harm, the gravity of the harm, and the feasibility and cost of a safer alternative design under the state of the art existing in 1987. Whether other cars lacking airbags were also defectively designed would depend on their relevant circumstances. For example, NHTSA determined in 1984 that in certain model cars airbags could readily be installed by the 1987 model year. Others faced difficult technological obstacles and design problems that would take up to five years to overcome. 49 Fed. Reg. 28970 (1984). A jury decision that makers of cars in the former group should compensate plaintiffs for injuries that would have been prevented by an airbag does not mean that the latter group of cars was defective for lack of a safety device that was not yet feasible.

The facts in this case illustrate that defective design is a case-by-case determination. According to the complaint, plaintiff was severely injured despite wearing her seatbelt because the seat itself broke away from its moorings due to inadequate design. If supported by the evidence, the jury could determine that in view of this particular tendency, Honda's reliance on belts alone for occupant protection was unreasonable. Such a verdict cannot be said to mean that any automobile lacking airbags is defectively designed.

This misunderstanding of the operation of product liability causes of action --that verdicts impose objective design standards that are equivalent to federal safety standards -- distorts the preemption analysis of the lower court and other federal courts. The courts recite the presumption against preemption, but they read the statutory language through preemption-colored glasses.

Significantly, a number of state supreme courts, which are most directly involved in the development and application of state product liability law, have held that causes of action are not preempted by Standard 208. *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376 (N.Y. 1998); *Munroe v. Galati*, 189 Ariz. 113, 938 P.2d 1114 (1997); *Minton v.*

Honda of America Mfg., Inc., 684 N.E.2d 648 (Ohio 1997); *Tebbetts v. Ford Motor Co.*, 140 N.H. 203, 665 A.2d 345 (1995), cert. denied, 516 U.S. 1072 (1996); *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995).

Parts III and IV of this brief argue that plaintiff's cause of action was neither expressly nor impliedly preempted. However, ATLA urges this Court to provide additional guidance to courts faced with preemption claims that would eliminate the tort remedies for wrongful injury. Specifically, this Court should instruct that courts may not deprive injured victims of such common law actions in the absence of a clear and unambiguous statement that Congress intends such a result. Such a "plain statement" rule most closely effectuates the intent of Congress and furthers the constitutional design that underlies the preemption doctrine.

II. COURTS MUST NOT DEPRIVE TORT VICTIMS OF LEGAL REDRESS UNLESS CONGRESS CLEARLY AND UNAMBIGUOUSLY INTENDED TO PREEMPT COMMON LAW REMEDIES.

In recent years, this Court has twice addressed the relationship between federal safety regulation of consumer products and common law tort remedies traditionally available to people injured by unsafe products. In both instances, the Court addressed the issue of whether the scope of express preemption encompassed not only state positive law, but also common law damage suits. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the Court set out guideposts for courts faced with the growing number of cases involving federal preemption: The purpose of Congress "is the ultimate touchstone" in every pre-emption case. *Medtronic*, at 485; *Cipollone*, at 516. Secondly, the court must examine the plain text of the preemption provision and examine each of the plaintiff's causes of action. *Cipollone*, at 523-24; *see Medtronic*, at 492-502. Finally, the scope of express preemption is to be narrowly construed consistent with the

strong presumption against preemption. *Cipollone,* at 518; *Medtronic,* at 485;

In ATLA's view, the lower court ignored these basic precepts. The court's examination of the express preemption provision at issue, 15 U.S.C. § 1392(d), is very brief. Pet. at App. 8-9. The court did not inquire whether Congress intended the term "standard" to include common law actions, nor did it undertake a close examination of either the statutory language or of plaintiff's causes of action. Its reliance on *Cipollone* and *Medtronic* ignored the example set by this Court that each statute be addressed on its own terms and that the construction of preemption provisions cannot be transplanted from one statute another. *See Cipollone*, at 522-23; *Medtronic* at 489. The lower court's conclusion -- "Common law liability in this specific context, therefore, can reasonably be viewed as constituting a 'standard' that might conflict with Standard 208," Pet. at App. 9 -- is based on little more than the court's own ipse dixit.

This view that common law liability is necessarily at odds with federal safety regulation stands in dramatic contrast to the longstanding and widely accepted view that tort liability complements governmental regulation in promoting safety. Congress is capable of using unambiguous language to preempt common law liability. In the absence of plain statutory language to that effect, courts should presume that Congress intends that common law remedies coexist with federal safety regulation.

A. Courts Should Presume Congress Intends Common Law Remedies to Coexist With Federal Safety Regulation.

1. Tort Liability Complements Federal Regulation in Achieving Safety.

As the Twentieth Century has unfolded, efforts to protect consumers from unsafe products have taken a two-pronged approach. One means is to ensure that the

marketplace itself provides incentives for manufacturers to make their products safe. However, where private decision making by producers has been deemed insufficient, government has stepped in to impose safety upon them.

Marketplace forces include the legal requirements developed by the common law. The free market necessarily exists within a legal environment. The law of contracts, property and tort provide the basis for ordering their relations based on enforceable rights and obligations. In the absence of this legal matrix, companies and individuals could no more conduct business than eighteen people could accomplish a game of baseball in the weightless vacuum of outer space.[3]

Product liability, an amalgam of tort and contract, is the result of efforts by state common law courts to accommodate the law to a modern marketplace in which consumers seldom dealt directly with product makers and America's fledgling industries no longer required protection, beginning with the landmark decision by Justice Brandeis in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), and more fully developed in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), and *Greenman v. Yuba Power Products*, 377 P.2d 897 (Cal. 1963). Its most prominent formulation is set forth in Restatement (Second) of Torts §402A (1965). Although its purpose is to afford legal redress for death and injury, this product liability also plays a role, albeit an indirect one, in providing a disincentive to marketing unreasonably dangerous products in the first place. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products,* 44 Miss. L.J. 825, 826 (1973).

In his classic exposition, Dean Calabresi contrasts this indirect influence exerted on the market by tort law, which he calls "general deterrence" with governmental regulatory

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[3] On the importance of baseball to America's common law tradition, see Paul Finkelman, *Baseball and the Rule of Law,* 46 Cleveland St. L. Rev. 239 (1998).

mandates, or "specific deterrence. Guido Calabresi, THE COSTS OF ACCIDENTS 68-129 (1970). Manufacturers of defective, unreasonably dangerous products who are shielded from liability, are thereby able to externalize the cost of injuries caused by their products. Those products are therefore priced artificially low. *Id.* at 70. The costs of accidents are borne by the injured consumer, by first-party insurance, and by taxpayers through various government programs. But these entities are not in position to eliminate the risk. Nonliability is, in effect, a subsidy to the makers of unsafe products, giving them an economic advantage over manufacturers who have invested in safety. *Id.*

Product liability allocates to manufacturers the cost of harm caused by an unreasonably dangerous product, so that the purchase price reflects its true social cost. Market forces then lead the manufacturer -- who is in the best position to do so -- to determine the most cost-efficient means of minimizing those costs. *See also* Restatement (Second) of Torts §402A, comment c (1965); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1119-20 (1960); Richard C. Ausness, *Compensation For Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 46 Wayne L. Rev. 1085, 1140 (1990)("efficient allocation of resources is more likely if product prices reflect their actual social costs"). To the extent that prevention of injury is cheaper than the compensation of the injured, there is an incentive for manufacturers to make their products safer. Wade, *supra,* at 826.

Federal safety regulations also promote the safety of products entering the marketplace. But they do so in a much different manner. Administrative regulations are prospective; liability assesses past conduct. Regulations take the form of objective criteria applicable to a class of products. A liability verdict assesses whether a manufacturer breached a duty of care under the circumstances of a particular case. Regulatory penalties and injunctions are designed to enforce compliance

with safety standards. The amount of a liability verdict is designed to compensate for wrongful death and injury.

Federal safety regulation and state tort liability have coexisted for decades. It is a widely accepted principle of tort law that "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence when a reasonable person would take additional precautions." Restatement (Second) of Torts §288(C)(1965). Prosser at 203-04.

Courts have harmonized product liability with federal regulatory standards by viewing the latter as "a floor, not a ceiling." *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542-43 (D.C. Cir. 1984) ("federal legislation has traditionally occupied a limited role as the floor of safe conduct); *Rucker v. Norfolk & Western R.R.*, 396 N.E.2d 534, 537 (Ill. 1979); *Stevens v. Parke, Davis & Co.*, 507 P.2d 653, 661 (Cal. 1973); *Raymond v. Riegel Textile Corp*, 484 F.2d 1025 (1st Cir. 1973); *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981); *see generally*, Clarence Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 Tex. L. Rev. 143, 157-66 (1949).

In sum, liability and regulation have generally been recognized as complementary means to promote safety. *See* American Law Institute, Reporters' Study: Enterprise Responsibility For Personal Injury vol I, 47-49 (1991); Teresa M. Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 12 J. Prod. Liab. 305 (1989); Steven Shavell, *Liability for Harm Versus Regulation of Safety,* 13 J. Legal Studies 357 (1984). Congress may be assumed to be familiar with these common law principles of ordinary tort litigation. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 67 (1989).

This view has specifically included the Safety Act. In the landmark decision involving automobile crashworthiness, *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir.

1968), the court stated: "It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability."

This Court has recognized that Congress may intend that common law remedies coexist with federal safety regulation. For example, the Court determined in *Silkwood v. Kerr-McGee Corp.*,:

> Congress did not believe that it was inconsistent to vest the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards.

464 U.S. 238, 258 (1984). Justice Blackmun, dissenting on other issues, agreed with the majority on this point:

> Whatever compensation standard a State imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results. . . . Compensatory damages therefore *complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme.*

Id. at 264 (Blackmun, J., dissenting)(emphasis added).

In such cases, ATLA suggests, courts should adopt the presumption that "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted." *Id* at 255.

2. The Indirect Incentive for Safety Created by Potential Common Law Liability Does Not Conflict With the Exercise of Federal Safety Regulation.

The core of the preemption doctrine is the exercise of federal power. The exercise of state authority through administrative or legislative regulation may present a direct conflict with federal regulation. Common law liability

operates only indirectly, by enhancing market incentives for safety, and does not constitute the type of direct exercise of state authority that preemption addresses. As this Court explained:

> The effects of *direct* regulation on the operation of federal projects are significantly more intrusive than the *incidental* regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that *incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988)(emphasis added). Shortly thereafter, the Court reaffirmed the importance of this distinction:

> We recognize that a claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistleblowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field.

English v. General Electric Co., 496 U.S. 72, 85 (1990).

Highly persuasive is this Court's decision in *New York Conference of Blue Cross v. Travelers Ins.*, 514 U.S. 645 (1995). The Court held that a state surcharge on hospital bills covered by commercial insurers are not preempted by |29 U.S.C. §144(a), which preempts state law that "relate to any employee benefit plan." The charges made nonprofit insurance "more attractive (or less unattractive) as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans."

Nevertheless, "laws with only an indirect economic effect on the relative costs of various health insurance packages" are not preempted. *Id.* at 659.

B. Courts Should Presume that Congress Does Not Intend to Abolish Common Law Remedies In A Field that Is Within the Responsibility of the States.

Providing legal recourse for those injured by dangerous products has been the province of the states.

> Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or "general," be they commercial law *or a part of the law of torts*. And no clause in the Constitution purports to declare such a power upon the federal courts.

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938)(Emphasis added).

The states have a strong interest in developing and preserving avenues for legal redress for victims of wrongful injury. *See Medtronic,* at 487-89. Although Congress wields the power to supersede state law, due regard for federalism requires courts to "start with the assumption that the historic police powers of the states were not to be superseded by [a] federal act unless that was the clear and manifest purpose of Congress." *Medtronic* at 485; *See also Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963)(preemption of state law must be based on an "unambiguous congressional mandate to that effect").

This strong presumption against preemption of state tort law is simply an application of the broader "plain statement" doctrine which Justice O'Connor described in *Gregory v. Ashcroft*, 501 U.S. 452 (1991):

> "[I]f Congress intends to alter the usual constitutional balance between States and the Federal government, it must make its intention to do so unmistakably clear in the language of the statute."

Id. at 464. *See also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

Requiring Congress to speak plainly if it intends to cut off traditional state tort remedies does no violence to the principle that courts be guided by the intent of Congress. To the contrary, it provides an essential safeguard against judicial suppression of state law that was not intended by federal lawmakers. In addition, this plain statement requirement assures the states the opportunity to defend their sovereign authority. This Court in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), held that the integrity and sovereignty of the states is safeguarded primarily by their representation in Congress.

> By declining to infer preemption in the face of congressional ambiguity, the Court is . . . furthering the spirit of *Garcia* by requiring that decisions restricting state sovereignty be made in a deliberate manner by Congress, through the explicit exercise of its lawmaking power to that end. . . .
>
> Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.

Gregory v. Ashcroft, 501 U.S. at 464.

C. Courts Should Presume Congress Does Not Intend Preemption Which Would Deprive Wrongfully Injured Persons Without a Remedy.

In one of this Court's earliest pronouncements, Chief Justice Marshall stated that

> the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the

> laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). This right of access to justice is so fundamental that this Court has located "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes,* 115 U.S. 512, 521 (1885).

In view of the importance of this right, this Court has stated "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) quoted in *Medtronic,* at 487. As Justice Blackmun added, "The absence of federal regulation governing the compensation of victims is strong evidence that Congress intended the matter be left to the States." *Id.* at 464 U.S. at 264 n.7 (1984)(Blackmun, J., dissenting). *See also United Construction Workers v. Laburnum Const. Co.*, 347 U.S. 656, 663-64 (1954).

Indeed, there is at least a substantial question whether due process limits the authority of the federal government to abolish common law remedies without providing a reasonable alternative means for redress of injury. This was left as an open question in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 86-88, 91-93 (1978). There the Court suggested that the elimination of the common law right to a tort remedy in the Price-Anderson Act might violate due process but for the "panoply of remedies and guarantees" provided by Congress. *Id.* at 86-88 and 91-93.

The lower court's decision in this case, despite the absence of a clear statement that Congress intended to do so, has "the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the

judgment of Congress, needed more stringent regulation." *Medtronic*, at 487.

III. THE MOTOR VEHICLE ACT DOES NOT EXPRESSLY PREEMPT PRODUCT LIABILITY CAUSES OF ACTION

The lower court determined that 15 U.S.C. 1392(d) could be viewed as expressly preempting product liability remedies. Pet. at App. 9. Finding this conclusion irreconcilable with the savings clause, however, the court undertook an implied preemption analysis. Pet. at App. 12. ATLA submits that the proper construction of the preemption provision clearly does not include plaintiff's common law causes of action, even in the absence of the savings clause

This Court has spelled out the process for determining whether an express preemption provision includes common law causes of action.

> we must fairly but-in light of the strong presumption against pre-emption-narrowly construe the precise language of [the preemption provision] and we must look to each of petitioner's common law claims to determine whether it is in fact pre-empted. The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a ["safety standard"] giving that clause a fair but narrow reading.

Cippolone, 505 U.S. at 523-24.

A. The Text Of The Statute Indicates Congressional Intent To Preempt State Positive Law, But Not Common Law Remedies.

As was true in Medtronic, "if Congress intended to preclude all common-law causes of action, it chose a singularly odd word with which to do it." cite Although the lower court suggests that the term "standard" could include "requirements imposed by common law tort verdicts," Pet. at App. 9, such a reading demands that a jury be viewed as a

"State or political subdivision of a State." Though it is true that a jury award is "only enforceable under state law" by entry of judgment by a court, it is not "imposed by the state." *Cipollone,* at 505 U.S. at 526 n.24.

The fact that Congress used the exact phrase "safety standard" to refer to both the federal motor vehicle standard and the preempted area of state law strongly indicates that Congress intended to supersede only state administrative regulations similar in nature to the federal standards. *Compare, Medtronic,* 518 U.S. at 489.

Most importantly, the lower court ignored the definition of "safety standard" that Congress itself provided in the statute: Congress defined the term as: "[A] minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. §1391(2).

By characterizing federal standards as "minimum" the statute clearly permits standards to coexist with tort liability with federal standards performing their traditional role as a floor, not a ceiling. Indeed, an early and persuasive reading of this language is that Congress wished to avoid centralizing the function of promoting safe automobile design in a single agency that would be the target of the considerable power of the automotive industry. Rather, Congress may have intended potential liability "to spur the industry toward greater safety innovation, rather than permitting the manufacturers to discharge their obligations to the public by mere compliance with the administrative norms." Ralph Nader and Joseph A. Page, *Automobile Design and the Judicial Process,* 55 Calif. L. Rev. 645, 677 (1967).

Even if some uncertainty remains whether Congress intended § 1392(d) to immunize automakers from common law liability the legislative history demonstrates that Congress' purpose was to preempt positive law only.

Prior to passage of the Act, various states had attempted to impose legislative or administrative safety regulations on automobiles, though without notable success. Brenner, *Legal Requirements for the Equipment and Design of Private Motor Vehicles: State Action and National Problems*, 23 Geo. Wash. L. Rev. 429 (1955). Several state officials involved in those efforts testified before Congress. *See* Traffic Safety: Hearings on H.R. 13228 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess. pt. 1, at 413 (1966) (testimony of Iowa Attorney General Lawrence F. Scalise); Traffic Safety: Hearings on S. 3005 Before the Senate Comm. on Commerce, 89th Cong., 2d Sess. 511 (1966) (testimony of New York State Senator Edward Speno). Congress included the express preemption provision to avoid a situation in which automakers might be subjected to a multiplicity of such state regulations.

The Senate version of the bill, which contained a preemption provision but no savings clause, was not intended to affect product liability lawsuits. Indeed, the Senate Report draws the distinction between preempted safety standards and standards of care, which were deemed to be outside the scope of express preemption. "Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law." S. Rep. No. 1301, 89th Cong. 2d Sess. at 14 (1966)

The House bill contained the preemption provision that was ultimately enacted. Prophetically, an attorney testifying before the House Committee urged lawmakers to guard against the situation where "in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of 'Our product meets Government standards.'" Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess. 1249 (1966)(statement of Tom Triplett). The

Committee Chair responded "we do not intend to put that umbrella up, I assure you." *Id.* at 1258. Rep. Mackay re-emphasized that the intent of the legislation was that compliance with federal safety standards "does not preclude building a car with higher standards of safety, nor does it relieve makers of any legal liability whatsoever in terms of their obligations to the consumer. *Id.* at 1260.

It was in response to such concerns, and perhaps in an abundance of caution, that the House Committee added the savings clause, which ultimately was enacted as 15 U.S.C. § 1397(k). This history refutes the lower court's conclusion that this clause is in conflict with the preemption provision. The savings clause the congressional intent that was already expressed in § 1392(d) that common law remedies would continue to be available to injured plaintiffs. This is not an instance where legislative history yields mixed signals. "Indeed, nowhere in the Safety Act's history have we uncovered even the slightest hint that the preemption clause was intended to foreclose any state common-law duties enforced by damage actions." *Minton v. Honda of America Mfg., Inc.*, 684 N.E.2d 648, (Ohio 1997)

B. Plaintiff's Common Law Causes Of Action Do Not Fall Within Congress' Definition Of Safety Standard.

The statutory definition also limits preempted safety standards to standards "for motor vehicle performance" which provide "objective criteria." The court below did not examine plaintiff's causes of action to determine "whether the legal duty that is the predicate of the common law damages action constitutes" a safety standard within the meaning of § 1392(d). ATLA suggests that, to the extent that plaintiff's causes of action can be said to establish a standard, they represent a standard of care expected of product manufacturers, not a standard of performance for the product. Moreover, liability is determined by juries weighing the circumstances in each individual case, not by applying

objective criteria. They do not, therefore, meet the statutory definition of "safety standard."

Plaintiff's complaint asserts liability under three causes of action under the common law of the District of Columbia: negligent design, strict liability, and breach of implied warranty . The negligence cause of action requires a defendant to pay for injury caused by failure to exercise reasonable care, including providing reasonable protections to occupants in the event of foreseeable crashes.

Strict liability for design defects differs only slightly from negligence. Unlike liability for manufacturing defects, which focuses solely on the product, strict liability for design defects looks at the design choices made by the defendant. Under strict liability "the reasonableness of the manufacturer's act of placing the product as designed on the market is determined by the risk-utility analysis." *Warner Fruehauf Trailer Company, Inc. v. Boston,* 654 A.2d 1272, 1276 (1995). Plaintiffs "must 'show the risks, costs and benefits of the product in question and alternative designs,' and 'that the magnitude of the danger from the product outweighed the costs of avoiding the danger.'" *Artis v. Corona Corp.*, 703 A.2d 1214, 1216-17 (D.C. 1997) (citations omitted).. This risk-utility analysis is essentially a negligence standard. See |James A. Henderson, Jr. and Aaron D. Twerski, *Achieving Consensus on Defective Product Design,* 83 Cornell L. Rev. 867, 901 & 919 (1998).

The only substantive difference between negligence and strict liability for design defects is that contributory negligence is unavailable as a defense to strict liability. |*East Penn Mfg. Co. v. Pineda,* 578 A.2d 1113, 1118-19 (D.C. 1990). Factors include "the likelihood that it will cause injury, and the probable seriousness of the injury," the "availability of commercially feasible design alternatives," and "the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or

making it too expensive to maintain its utility," *Warner*, 654 A.2d at 1277.

The cause of action based on warranty is essentially the same as the strict liability cause of action under D.C. law. *Cottom v. McGuire Funeral Services, Inc.*, 262 A.2d 807, 808-09 (D.C. 1970) (adopting implied warranty without privity; any difference between warranty and strict liability is purely conceptual); *Bowler v.Stewart-Warner Corp.*, 563 A.2d 344 (D.C. 1989)(warranty and strict liability are one and the same).

In sum, plaintiff's common law causes of action ask the jury whether Honda breached a standard of care, not whether the car met some criterion of performance. A jury verdict for plaintiff would reflect its determination that Honda's decision to market the car without airbags was unreasonable in view of the magnitude and gravity of the risks to occupants and the feasibility and practicability of using a safer alternative design under the state of the art existing in 1987.

Manifestly, such a verdict establishes no objective criteria for automobiles. Moreover, "the risk-utility analysis must be applied in a flexible manner that is necessarily case specific." *Warner*, 654 A.2d at 1277. Certainly the factors considered by the jury will vary from case to case, and results may vary. For example, a jury may be more likely to find the decision to forego airbags unreasonable in smaller cars or, as in this case, cars where the seat may break free, making belts less protective. On the other hand, the design might not be unreasonable in older cars, made airbag technology was less developed. As this Court has long recognized:

> There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable . . . What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence.

Grand Trunk Railway Co. of Canada v. Ives, 144 U.S. 408, 417 (1892). Tort liability establishes no objective criteria.

At most, liability verdicts signal automakers of potential liability for failure to exercise a high degree of care for the protection of occupants in the event of motor vehicle collisions. They do not establish an objective criteria for vehicle performance and therefore do not constitute safety standards within the preempted scope of § 1392(d).

Finally, the savings clause set forth in § 1397 is not in conflict with the express preemption provision. As Arizona Justice Chief Feldman recently stated, "the two clauses work together to forbid states from enacting conflicting regulatory standards but allow common-law tort actions." *Hernandez-Gomez v. Leonardo*, 917 P.2d 238, 241 (Ariz. 1996).

The Court in *Cipollone* cited the Comprehensive Smokeless Tobacco Health Education Act of 1986, where Congress expressly pre-empted State law but provided a savings clause similar to § 1397, as an example of congressional intent to preempt only positive law while preserving state law damages actions. *Cipollone*, 505 U.S. at 518.

The savings clause "potently and pointedly negates any lingering notion of express preemption of State common-law claims. It is hard to imagine how Congress could have been plainer in its intended meaning." *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376, 382 (N.Y. 1998)

IV. PRODUCT LIABILITY CAUSE OF ACTION DOES NOT STAND AS AN OBSTACLE TO THE PURPOSES AND OBJECTIVES OF CONGRESS.

A. Where Congress' Express Preemption Does Not Clearly Encompass State Tort Remedies, Courts Should Not Undertake "Obstacle" Preemption.

The lower court stated that it could not reconcile the preemption provision with the savings clause. The court

therefore abandoned the effort to ascertain the intent of congress and engaged in implied preemption analysis. The Court in *Myrick* acknowledged that courts may find "implied conflict pre-emption where . . . state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'*Hines v. Davidowitz*, 312 U. S. 52, 67 (1941)." 514 U.S. at 288-89. ATLA suggests, however, that "obstacle" preemption is not appropriate to deny tort remedies traditionally available under state law.

The Court in *Myrick* stated that the existence of an express preemption provision "supports a reasonable inference-that Congress did not intend to pre-empt other matters," though it does not entirely foreclose any possibility of implied pre-emption. *Id.* Of course courts should consider evidence that Congress intended to occupy the field or that it is physically impossible to comply with federal and state regulations, despite more narrowly drafted express preemption language.

However, judicial preemption on the ground that state law as an "obstacle" to the accomplishment of federal purposes stands as an invitation to judicial policymaking. In this case, for example, even accepting that the question of express preemption of tort liability was too close to call, there is a substantial chance the court preempted a broad area of state law that Congress intended not to preempt. ATLA suggests that a perceived inconsistency in Congress' preemption sections is an exceedingly weak basis for such drastic action. If the court is truly in equipoise concerning Congress' intent, the presumption against preemption counsels preservation of state law.

Permitting courts to find "obstacle" preemption might be deemed appropriate where preemption would be consistent with uniquely national interests at stake in the statute. Indeed, the Court first articulated the language of "obstacle" preemption in the course of preempting an Alien

Registration Act adopted by Pennsylvania. on the basis of field preemption. Justice Black emphasized that the rule was designed to preserve areas of peculiarly national authority from state encroachment.

> [T]his legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.

Hines, 312 U.S. at 67-68. (Emphasis added).

This distinction was underscored in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), which involved local regulation of blood plasma. Justice Marshall, for the Court, noted :

> [I]n the seminal case of *Hines v. Davidowitz*, [312 U.S. 52 (1941)], the Court inferred an intent to preempt from the dominance of the federal interest in foreign affairs because 'the supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution,' . . . and the regulation of that field is intimately blended and intertwined with responsibilities of national government. Needless to say, those factors are absent here. Rather, as we have stated, the regulation of health and safety matters is primarily and historically, a matter of local concern.

Id. at 719.[4]

ATLA suggests that where preemption would supersede traditional state tort remedies and where Congress has expressly addressed the scope of preemption in language that does not clearly encompass those remedies, due regard

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[4] Compare *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), involving the impact of the Federal Clean Water Act on a state suit alleging pollution of a resort lake by a paper mill. The subject matter, interstate water pollution, was an area of national interest. Moreover, the Court emphasize that its holding "does not leave respondents without a remedy." *Id.* at 497.

for federalism counsels against eliminating tort actions on the basis of obstacle preemption. To hold otherwise, "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which it dislikes." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

> When the statute contains its own preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads it, is pursuing a fundamentally lawless path.

Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §6-25, at 483 n.8 (2d ed. 1988).

B. Product Liability Based on Failure to Equip Cars With Airbags Advances the Purposes and Objectives of Congress.

Even if the lower court were correct in undertaking an implied preemption analysis, it is clear that plaintiff's lawsuit does not "frustrate 'the accomplishment and execution of the full purposes and objectives of Congress.'" Myrick, quoting Hines, supra, at 67. Indeed, ATLA submits, common law actions such as plaintiff's serve to advance those goals.

The court below looked to portions of NHTSA's 1984 notice of final rulemaking with respect to Standard 208 and its accompanying statement. 49 FR 28962ff (1984). ATLA suggests that this document provides a compelling demonstration that NHTSA fully anticipated that product liability actions would not only remain available, but would further the objective of promoting wider use of airbags.

NHTSA reaffirmed its view that airbags represent the safest, though the most expensive, means of protecting occupants during collisions. 49 Fed. Reg. 28963. Responding to Congress' prohibition against a rule requiring airbags in all cars, NHTSA drafted Standard 208 to permit manufacturers

to choose between belts and bags for occupant protection. However, Congress clearly did not prohibit the use of incentives to encourage automakers to exceed the minimum requirements of the rule. Indeed, NHTSA offered its own incentive, crediting each automobile equipped with airbags as a car-and-a-half toward the manufacturer's compliance quota. 49 Fed. Reg. 29000. The additional incentive of avoiding common law liability clearly advances the agency's objective.

Responding to comments suggesting that automakers would overwhelmingly choose belts as the cheapest option, NHTSA stated that "competition, potential liability for any deficient systems and pride in one's product would prevent this." 49 Fed. Reg. 29000. Although pride in one's product is not to be disparaged, the agency was clearly relying on potential liability to induce manufacturers to choose airbags.

NHTSA also addressed concerns of carmakers that choosing airbags could increase their product liability exposure if they malfunctioned. In addition to providing evidence that choosing airbags would not increase product liability insurance premiums, NHSTA also suggested that choosing not to use airbags could itself be a source of product liability, quoting a comment by a representative of the National Association for Public Health Policy: "If a reasonable means of protection is being denied to the motoring public, that denial should lead to liability . . . People whose crash injury would have been averted had the car been equipped with an airbag can sue the car manufacturer to recover the dollar value of that injury." 49 Fed. Reg. 28972.

The lower court essentially held that the accomplishment of Congress' purpose of reducing injuries and deaths required NHTSA to work alone. ATLA submits that removing the threat of liability may itself frustrate the purpose of the Safety Act. For decades the industry "waged the regulatory equivalent of war against the airbag" *Motor*

Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 49 (1983). Reliance on regulation alone would further "encourage manufacturers to lobby for weaker regulations rather than developing safer products." Frank J. Vandall, *Undermining Torts' Policies: Products Liability Legislation*, 30 Am. U. L. Rev. 673, 687 (1981)

A cautionary example can be drawn from the sinking of the Titanic, "which complied with British governmental regulations setting minimum requirements for lifeboats when it left port on its final, fateful voyage with boats capable of carrying only about one-third of the people on board." Nader and Page, supra, 64 Geo. Wash. L. Rev. at 459; *see* John Dudman, THE SINKING OF THE TITANIC 2, 30 (1988)

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ALEXIS GEIER, *et al.*,
Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether compliance with a safety standard issued under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.*, precludes liability for breach of a state common-law duty of due care in automobile design.

2. Whether the promulgation of an occupant crash protection standard that can be satisfied by a number of alternative devices including airbags provides sufficient grounds for selectively implying preemption of common-law airbag omission claims.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments, including issues of federal preemption of state law.[1] *Amici* accordingly have filed briefs in such preemption cases as *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). This case involves another important preemption issue: whether the National Traffic and Motor Vehicle Safety Act (Safety Act), 15 U.S.C. § 1381 *et seq.* (now 49 U.S.C. § 30101 *et seq.*), preempts state common-law tort claims premised on a manufacturer's negligence in omitting airbags in the design of a motor vehicle.

Through the distinctive institution of the common law of torts, the States have long protected persons injured by negligently and defectively designed products by requiring that manufacturers compensate them. *See, e.g., MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). In the context of negligently designed motor vehicles, state tort liability also promotes public safety by encouraging manufacturers to design their products in light of available safety technology. In keeping with the Safety Act's purpose of reducing the toll of motor vehicle accidents, deaths and injuries, *see* 15 U.S.C. § 1381 (1982 & Supp. 1987),[2] Congress expressly preserved

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

[2] All citations to the prior version of the National Traffic and Motor Vehicle Safety Act are to the 1982 U.S. Code and the 1987 Supplement thereto.

state common law tort liability even when a negligence claim is premised on a design that complies with an applicable federal safety standard. *See* 15 U.S.C. § 1397(k).

Because of the importance of the issues presented to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

Federal law preserves petitioners' claim that the respondent's omission of airbags in their design of the 1987 Honda Accord breached their state common law duty of due care. As a general matter, the Safety Act expressly preserves, rather than preempts, common law claims concerning automobile components that comply with an applicable federal motor vehicle safety standard. Because the common law of negligence takes regulatory requirements into account as evidence of the proper standard of due care, the intended effect of the Safety Act's preservation scheme is not to create two unrelated bodies of law affecting automakers, but to maintain the traditional sound relationship between legislative or administrative regulation and common law liability. Within the Safety Act's general framework of preservation, neither federal legislation nor the particular federal regulation addressing occupant crash protection, 49 C.F.R. § 571.208 (Standard 208), reveals any basis for selectively implying preemption of petitioners' specific airbag claim.

1. The two provisions of the Safety Act that define the preemptive force of administratively established motor vehicle safety standards, 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(k), expressly distinguish between preempted state legislative or administrative law and preserved state common law. Section 1392(d) uses identical substantive and procedural language to describe the federal law that ex-

erts preemptive force and the state law that it preempts—"safety standards" that have been "established" and are "in effect." It is thus read most naturally to preempt the kinds of state law that are created in the same way that the preempting federal law is: legislation and administrative regulation. Section 1397(k) reinforces this distinction by explicitly preserving "liability under common law," but not state legislation and regulation, in the face of compliance with federal standards. Unlike other federal scope-of-preemption provisions, section 1397(k) contains neither an exception for state law covered under section 1392(d), nor coverage of state statutory law that is not covered under section 1392(d). Accordingly, section 1397(k) is both too broad and too narrow to serve as a general savings clause preserving whatever state law is not inconsistent with federal law.

The intended purpose of the Safety Act's preemption scheme is to ensure unitary legislative and administrative regulation of automobile safety, while preserving the traditional relationship between administrative regulations and common-law liability, which deems regulations informative but not determinative of liability. That traditional relationship, acknowledged by this Court over a century ago in *Grand Trunk Railway Co. v. Ives*, 144 U.S. 408, 421 (1892), maintains the distinct identity of the two complementary regimes of administrative regulation and the common law of torts. Those two regimes have differences of particularity, temporal perspective, and purpose that counsel against collapsing them, as this Court has recognized in the opposite direction by its reluctance to imply private rights of action into federal regulatory schemes. Where, as here, Congress has provided in plain language for the continued partial independence of the two regimes, there is no reason not to implement that directive.

2. Against the background of general express preservation of common law claims alleging negligence in designs

complying with federal motor vehicle safety standards, neither federal legislation nor Standard 208 and its history provide any basis for selectively implying preemption of airbag claims. The case for implied preemption in the face of express preservation is at its strongest where there is an actual conflict between state and federal law, forcing an affected person to violate one law or the other, and where the express provision at issue is a general savings clause that purports to preserve all state law without distinction. It is at its weakest where, as here, there is no actual conflict, but only an invocation of Congressional purpose that is usually best defined by the text of the statute itself, and where the express language of the statute precisely limits the federal law's preemptive force to a particular type of state law.

The federal legislation mistakenly relied on by some lower courts to support selective implied preemption of airbag claims, 15 U.S.C. § 1410b, falls short in three respects. Section 1410b is completely consistent with continued preservation of common-law claims regarding airbags; it imposed only procedural limitations on the Secretary's ability to promulgate safety standards requiring airbags; and those limitations lapsed in 1977, when the Secretary first promulgated a regulation phasing in a passive restraint requirement.

In the absence of any relevant legislation other than the Safety Act itself, it is doubtful that the Secretary had any authority to immunize manufacturers from liability for automobile components on a case-by-case basis, since section 1392(d) and section 1397(k) clothe standards issued under the Act with uniform preemptive force. In any event, neither Standard 208 nor its history reveal any evidence of an intent to create a unique "liability-free zone" around airbags. Standard 208's provision of alternative means to comply with occupant crash protection requirements is perfectly consistent with an intent to provide flexibility under federal law while leaving state common law claims untouched. Most of the regulatory history cited by the lower courts in support of selective preemption is either irrelevant or actually weighs against a finding of implied preemption. The few sentences of regulatory history that speak vaguely of automakers' discretion with regard to passive restraints are far too indistinct and equivocal to extinguish, without further notice and opportunity to object, the States' ability to provide relief to persons injured in their jurisdictions by negligent conduct.

ARGUMENT

I. THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT'S EXPRESS PRESERVATION OF COMMON LAW CLAIMS MAINTAINS A LONG-STANDING, SOUND TRADITION

The plain language of the National Traffic and Motor Vehicle Safety Act's preemption provisions require safety standards established by state legislative and administrative bodies to be identical to federal standards validly established by the Secretary of Transportation, but do not prevent state courts from awarding compensation to individuals injured by motor vehicles that violate traditional common-law standards of due care, even if they meet federal standards. The courts that have held Safety Act standards to preempt common-law tort actions rely heavily on the view that the common law regulates in virtually the same manner as administrative schemes, and therefore should not be treated differently for preemption purposes, even in the face of plain language that mandates different treatment. This understanding, however, fails to recognize the different, complementary roles and purposes of administrative regulation and tort liability. For over a century,

both this Court and state courts have recognized the different roles of these legal regimes, and have established a traditional understanding of their distinctiveness. In light of this tradition, Congress's demonstrated intent to displace state administrative regulation while leaving state common law in place makes eminent sense.

A. The Safety Act Expressly Distinguishes Between Preempted State Legislative or Administrative Regulation and Preserved State Common Law Claims

When read together, the two Safety Act provisions crucial to this case, 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(k), expressly establish a distinction between state legislative and administrative regulations, which are preempted if not identical to federal standards, and state common-law tort liability, which may be imposed even if the defendant has complied with a relevant federal standard. Even if read alone, section 1392(d) most naturally applies only to state administrative regulations, and not to common-law liability. Most tellingly, that section uses identical language to describe (1) the federal law that exerts preemptive force—a "safety standard" that has been "established" and is "in effect," and (2) the scope of that preemption—a removal of state authority to "establish" or to "continue in effect" any "safety standard" not identical to the federal standard. Congress may sometimes use general terms such as "requirement," "prohibition," and "standard" to encompass liability rules suggested by the verdicts in common-law tort cases. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992); *CSX Transportation v. Easterwood*, 507 U.S. 658, 664 (1993). Here, however, the parallel use of both substantive and procedural terms suggests that Congress meant to preempt those state "safety standards" that were

"established" and "in effect" in the same way that the federal standards were established and in effect—through legislative and administrative adoption.

Any doubt about the proper reading of section 1392(d) is put to rest by 15 U.S.C. § 1397(k), which provides in full that "[c]ompliance with any Federal motor vehicle safety standard issued under this title does not exempt any person from any liability under common law." Like a perfectly matching puzzle piece, section 1397(k) expressly preserves just that portion of state law—common law—that is not preempted under the most natural reading of section 1392(d).[3] Section 1397(k) is therefore not a general savings clause of the type that this Court has sometimes construed narrowly to eliminate conflict with other substantive provisions. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) (construing a provision purporting to save "the remedies now existing at common law or by statute"); *Chicago & North Western Trans. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 328 (1980) (same); *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915) (same); *Texas & Pacific Rwy. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (same); *cf.* 15 U.S.C. § 2074(a) (purporting to preserve "liability at common law or under State statutory law"); 15 U.S.C. § 4406(c) (purporting to preserve "liability . . . at common law or under state statutory law"); 21 U.S.C. § 360pp(e) (purporting to preserve "liability at common law or under Statutory law");

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[3] To *amici*'s knowledge, there is only one other federal statutory scheme that exhibits the same preemption-clause structure. The National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. § 5401 *et seq.*, contains provisions nearly identical to 15 U.S.C. §§ 1392(d) and 1397(k). *See* 42 U.S.C. §§ 5403(d), 5409(c). The only reported decision to construe these provisions concluded that they preserved the plaintiff's common-law tort claim. *See Shorter v. Champion Home Builders Co.*, 776 F. Supp. 333, 338 (N.D. Ohio 1991).

46 U.S.C. § 4311(g) (purporting to preserve "liability at common law or under State law"). Unlike these blanket provisions, § 1397(k) singles out a particular kind of state law—common law—for preservation.

Because section 1397(k) does not preserve state statutory and administrative law, it is too narrow, as well as too broad, to support the lower courts' view that it was meant to clarify "that compliance with Federal standards does not exempt anyone from any liability that the States have authority to impose." *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1415 (9th Cir. 1997); Pet. App. 5a (noting that the district court followed the Ninth Circuit's approach in *Harris*). Congress knows how to write the provision that the Ninth Circuit and the district court mistakenly read into section 1397(k), and it did so just two years after it drafted section 1397(k), in the Radiation Control for Health and Safety Act of 1968. In language similar to that of 15 U.S.C. § 1392(d), but without its precise parallelism, the first sentence of section 360F of that Act provides that promulgation of an electronic product performance standard under the Act deprives States of the authority to establish different standards respecting the same aspect of performance. *See* Radiation Control for Health and Safety Act of 1968, Pub. L. 90-602, § 360F, 82 Stat. 1173 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1352, 1367-68, *codified at* 21 U.S.C. § 360ss. Section 360C(e) of the Act then provides:

> *Except as provided in the first sentence of section 360F*, compliance with this subpart or any regulations issued thereunder shall not relieve any person from liability at common law *or under statutory law*.

Radiation Control for Health and Safety Act of 1968, Pub. L. 90-602, § 360C(e), 82 Stat. 1173 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1362, 1366, *codified at* 21 U.S.C. § 360pp(e) (emphasis added). By contrast, section 1397(k) has no qualifying clause indicating that it yields

to any potential conflict with section 1392(d), and it has no reference to the preservation of liability under statutory law. The first omission makes § 1397(k) too broad to preserve state law only when there is no applicable federal standard, and the second omission makes it too narrow, since it would then leave some state statutory and administrative law in limbo—not preempted by section 1392(d), but not preserved by section 1397(k), either. The unavoidable conclusion is that the Safety Act's preemption scheme was not cast in the same mold as the Radiation Control Act's, but instead reflects a conscious decision to distinguish between preempted state legislative and administrative regulation, and non-preempted state common law.

Legislative history materials only reinforce the plain meaning of sections 1392(d) and 1397(k), by confirming that the distinction between preempted state legislation and preserved common-law liability was indeed contemplated by members of Congress, without recorded opposition. The House Committee Report, for example, explained that § 1397(k) meant that "compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law, particularly those relating to warranty, contract, and tort liability." H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966). During floor debates, Representative Dingell argued against a proposed amendment adding criminal penalties to the bill by noting that it already provided for more than enforcement of federal safety standards:

> [W]e have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of common law which are afforded to the purchaser, remain in the buyer, and they can be exercised against the manufacturer.

112 Cong. Rec. 19,663 (1966). This and other legislative history leaves no doubt that the plain meaning of sections 1392(d) and 1397(k) was the meaning aired during the legislative process.[4] That plain meaning preempts state legislative and administrative regulation, but preserves common law tort actions such as Ms. Geier's.

B. The Safety Act's Distinction Between Common Law and Administrative Regulation Seeks to Maintain a Long-Standing Tradition of Continuing Importance

Over a hundred years ago, this Court, following the broad consensus of state courts, ruled that compliance with legislative safety standards was not a conclusive defense in a common-law personal injury action, but only provided evidence of the defendant's exercise of due care. *See Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 420-21 (1892) (citing *Chicago, Burlington & Quincy R.R. Co. v. Perkins*, 17 N.E. 1 (Ill. 1888) and *Thompson v. New York Cent. R.R.*, 17 N.E. 690 (N.Y. 1888)). Over the intervening century, this principle has remained the near-universal understanding of the ordinary relationship between legislative or administrative regulation and common-law tort liability. In 1965, the Restatement (Second) of Torts acknowledged the settled understanding that "[c]ompliance with a legislative enactment or an administrative

[4] For other statements articulating this plain meaning, *see* S. Rep. No. 1301, 89th Cong., 2d Sess. 12 (1966) ("[T]he Federal minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person from product liability at common law."); 112 Cong. Rec. 14,230 (1966) (statement of Senator Magnuson) ("Compliance with Federal standards would not necessarily shield any person from broad liability at the common law. The common law on product liability still remains as it was."); Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess. 1260 (1966) (statement of Representative Mackay) ("[T]he agency bill provides for certification of vehicles that actually met minimum safety standards. This does not . . . relieve makers of any legal liability whatsoever in terms of their obligation to the consumer.").

regulation does not prevent a finding of negligence where a reasonable man would take additional precautions." *Restatement (Second) of Torts* § 288C (1965). Over three decades later, the Restatement (Third) of Torts: Products Liability reiterated that "a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect." *Restatement (Third) of Torts: Products Liability* § 4(b) (1998); *see* W. Keeton, *et al., Prosser and Keeton on the Law of Torts* 233 (5th ed. 1984) ("While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue.").

As many of the lower court decisions correctly construing the Safety Act's preemption scheme have noted, the scheme preserves this traditional relationship between regulations and common-law tort liability, while ensuring unitary legislative and administrative control of the regulations. *See, e.g., Dorsey v. Honda Motor Company Ltd.*, 655 F.2d 650, 656 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Schwartz v. American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983); *Volkswagen of America v. Young*, 321 A.2d 737, 746 (Md. 1974). Two floor statements about the Act demonstrate that Congress was entirely aware of this consequence. Senator Cotton explained that the Act "declar[es] that compliance with any Federal standard does not exempt any person from liability under common law," 112 Cong. Rec. 21,490 (1966), but further stated that "it seems clear . . . that proof of compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it." *Id.* Senator Magnuson similarly stated his understanding that

§ 1397(k), while providing that "compliance with Federal standards does not exempt any person from common law liability[,] . . . does not prevent any person from introducing in a lawsuit evidence of compliance or noncompliance with Federal standards." 112 Cong. Rec. 21,487 (1966).

1. An appreciation of this traditional doctrine, and its function in keeping the institutions of administrative regulation and the common law of torts distinct, leads to a firmer grasp of Congressional intent in delineating the scope of preemption as it did in sections 1392(d) and 1397(k). The principle that compliance with legislative or administrative regulation is not determinative of common-law tort liability reflects differences of particularity, temporal perspective, and purpose between those two legal regimes. First, while statutes and administrative regulations are necessarily abstract and general, common-law tort liability begins with and remains tied to the particular facts of each case. One corollary of this difference is that a legislative regulation cannot anticipate every particular circumstance in which a reasonable person exercising due care would take additional precautions. *See, e.g., Caviote v. Shea*, 165 A. 788, 789 (Conn. 1933) (defendant's compliance with parking regulations did not preclude a finding that he should have taken additional precautions to ensure visibility on winding road in dark, foggy conditions). In the case of automobile occupant crash protection devices, for example, an automaker might learn that, whether or not airbags substantially reduce passenger injuries in car accidents generally, they dramatically reduce injuries in smaller-than-average cars, or in cars with some other specific set of features. If compliance with a general occupant crash protection standard such as Standard 208 shields the automaker from common-law tort liability for failure to install airbags in the particular models in which they would make a dramatic difference, accident victims are left without a remedy for injuries caused by

the automaker's unreasonable behavior, and the automaker has no legal incentive to act on its knowledge to reduce injuries.

The particularity of the common law—the fact that cases are its basic building blocks—also means that common-law tort litigation does not establish rules in the same way that legislative or administrative regulation does, so that preserving common-law liability does not create the same potential for conflict as would preserving state statutory regulation. First, in the common law system of precedent, defendants are always free to argue that a previous case should be read more narrowly than its explicit language suggests, to limit it to particular facts in that case.

Second, because of the importance of factual variations in product liability cases, courts have refused to let plaintiffs engage in the offensive use of collateral estoppel in those cases, outside of the narrow areas of asbestos and diethylstilbestrol (DES) cases. *See, e.g., Goodson v. McDonough Power Equipment, Inc.*, 443 N.E.2d 978, 988 (Ohio 1983) ("non-mutual collateral estoppel may not be used to preclude the relitigation of design issues relating to mass-produced products when the injuries arise out of distinct underlying incidents"); John S. Allee, *Product Liability* § 9.03[2] (1989); Victor E. Schwartz & Liberty Mahshigian, *Offensive Collateral Estoppel: It Will Not Work In Product Liability*, 31 N.Y. L. Sch. L. Rev. 583, 587 (1986) (footnote omitted). The result is that a finding of liability in one case does not necessarily fix a standard of conduct in the way that legislative or administrative regulation does.

2. Tort law also contributes a different temporal perspective on conduct than does legislative and administrative regulation. A statute or regulation is based on information gathered before its enactment, and yet only governs conduct after enactment. It is therefore potentially obsolete as soon as it becomes effective. No legislature

or administrative body can continuously and instantaneously update standards as new information and technology become available; amendments can only be made periodically, and with substantial lag time. The National Highway and Transportation Safety Authority is no exception to this general rule. By many accounts, its rulemaking efforts have been particularly subject to delay. *See, e.g.*, Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. on Reg. 257, 283, 295-97 (1987). This Court itself has noted the lengthy delay in promulgating Standard 208, which "[o]ver the course of approximately 60 rulemaking notices, [was] imposed, amended, rescinded, reimposed, and . . . rescinded again." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983).

By contrast, the development of the common-law duty of due care is continuous. If, as a result of new information or advances in technology, a reasonable person would have changed the design of a product in time to prevent an injury—allowing for a reasonable period to implement that design through manufacturing—then that person is legally responsible for that injury, even if regulatory standards have not kept up with the relevant advances in knowledge and technology. This temporal perspective allows tort law to fill unavoidable gaps in statutory or administrative safety regulation.

3. Finally, tort law and safety regulation have different primary purposes. Traditionally, the primary purpose of the common law of torts is providing compensation for injury to private parties. Although tort law also has a deterrence function, the absence of a deterrent effect in a particular case has no effect on an injured party's ability to recover compensation.

By contrast, the primary purpose of safety regulation is to reduce future injury and property damage, not to

provide compensation for injuries. Although a few federal safety regulation schemes specifically provide for private rights of action, *see, e.g.*, 15 U.S.C. § 2072(a) (providing a private right of action for violations of the Consumer Products Safety Act), the National Traffic and Motor Vehicle Safety Act is typical in its omission of explicit private rights of action. Recognizing the important difference between public safety regulation and private liability for injuries, courts have generally refused to imply private rights of action under federal safety regulations, including the NTMVSA. *See, e.g., Handy v. General Motors Corp.*, 518 F.2d 786, 788 (9th Cir. 1975) (NTMVSA); *Bailey v. Johnson*, 48 F.3d 965, 967-68 (6th Cir. 1995) (FDCA); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir.) (FAA), *cert. denied*, 479 U.S. 872 (1986); *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 991-92 n.9 (2d Cir. 1980) (FIFRA), *cert. denied*, 454 U.S. 1128 (1981).

In refusing to redefine private tort liability in terms of public regulatory standards, these courts are demonstrating the same sensitivity to Congressional intent that this Court has shown in its reluctance to imply private rights of action generally. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18, 23-24 (1979); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 77 (1992) (Scalia, J., concurring in the judgment) (suggesting that the Court "perhaps ought to abandon the notion of implied causes of action entirely"). When Congress creates an integrated scheme of public regulation and enforcement, this Court has noted that it would often defeat Congress's purpose, rather than further it, to redefine private liability based on those public regulatory standards. *See, e.g., Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 93-

94 (1981) (declining to recognize an implied right of action for contribution against a joint tort-feasor under the Equal Pay Act of Title VII because private enforcement would likely defeat Congressional intent).

For the same reasons that this Court has become reluctant to create new private rights of action by implication, it should be reluctant to destroy existing private rights of action by implication. Both actions are likely to misconstrue Congressional purpose by oversimplification, assuming that, if Congress approved of a substantive standard, it wanted that standard and only that standard enforced by all possible means. Congress legislates against the background of a legal system in which the common law of torts is a longstanding institution with a focus, perspective, and purpose distinct from administrative regulation. Because of those distinctions, it makes perfect sense that Congress would want the federal government to become the sole administrative regulator, preempting administrative regulation at the state level, while leaving the state common law of torts intact.

To be sure, one of Congress's interests in adopting a scheme of federal automobile safety regulation was an interest in uniformity, as various snippets of legislative history suggest. *See, e.g.*, S. Rep. No. 1301, 89th Cong. 2d Sess. 12, *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (describing the desideratum of motor vehicle safety standards that are "uniform throughout the country"). Yet Congress could well have believed that the lion's share of uniformity benefits were achieved by ensuring that automakers will only have to deal with one set of administrative safety regulations rather than fifty. After all, most automobile safety issues will never become the subject of litigation by an individual against an automaker, because the amounts involved are too small. In that small percentage of cases in which individuals are gravely enough injured by a defective automobile to contemplate an expensive,

time-consuming product liability suit against an automaker, Congress could have decided that the balance tilted in favor of allowing States to award compensation for negligent conduct.[5] In those infrequent cases, the interest in providing relief to the injured party is at its apex, and the automaker's conduct is of the type that it is most important to deter to promote automobile safety, which is, after all, the principal purpose of the Safety Act. *See* 15 U.S.C. § 1381 (declaring that the purpose of the Safety Act is "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents"). Ultimately, however, neither Congress's particular reasons for preserving common law tort claims nor their persuasiveness are controlling. The plain language of the Safety Act makes clear Congress's intent to distinguish between preempted administrative regulation and non-preempted common-law actions.

II. THERE IS NO BASIS IN FEDERAL LEGISLATION OR ADMINISTRATIVE REGULATION FOR SELECTIVELY IMPLYING PREEMPTION OF COMMON-LAW TORT CLAIMS INVOLVING AIRBAGS

A number of lower courts, including the court below, have used implied preemption doctrine to create a nontextual "airbag exception" to the Safety Act's express preservation of common-law tort claims. *See* Pet. App. 15a-16a; *Taylor v. General Motors Corp.*, 875 F.2d 816, 827-28 (11th Cir. 1989); *Pokorny v. Ford Motor Co.*, 902

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[5] If Congress had indeed judged that automotive product liability litigation would be relatively rare and inconsequential, that judgment has been confirmed by a recent study that uncovered only 93 automotive product liability awards over an eleven-year period—less than nine per year—and that found that the awards had no statistically significant effect on the defendants' stock prices or on sales of the defective automobile model. *See* Steven Garber & John Adams, *Product and Stock Market Responses to Automotive Product Liability Verdicts*, in *Brookings Papers on Economic Activity: Microeconomics* 1 (Martin Bailey, *et al.*, eds., 1998).

F.2d 1116, 1123-25 (3rd Cir. 1990); *Cooper v. General Motors Corp.*, 702 So.2d 428, 438-40 (Miss. 1997); *Cellucci v. General Motors Corp.*, 706 A.2d 806, 811 (Pa. 1998).

These courts acknowledge that a Federal Motor Vehicle Safety Standard does not ordinarily create a safe harbor immunizing manufacturers from common-law defective design liability. *See, e.g., Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 783 (3d Cir. 1992) (holding that the Federal Motor Vehicle Safety Standard governing illumination did not preempt state common-law tort claims for defective design of illumination, and expressly distinguishing airbag cases). Yet they conclude that in the case of defective design claims involving airbags, preemption of the common law of torts must be implied to protect a Congressional purpose abstracted from various bits of federal legislation, administrative regulation, and legislative history. *See* Pet. App. 14a-15a (citing Standard 208 and its "tortured history"); *Taylor*, 875 F.2d at 826-28 (citing Standard 208 and three pieces of federal legislation); *Pokorny*, 902 F.2d at 1123-24 (citing Standard 208 and one piece of federal legislation); *Cooper*, 702 So.2d at 438 (citing Standard 208); *Cellucci*, 706 A.2d at 810 (citing Standard 208). This conclusion relies both on an excessive loosening of this Court's implied preemption requirements and on unwarranted inferences of legislative and administrative intent. A careful reading of the relevant legislation and regulations reveals no evidence of intent sufficient to imply preemption under proper preemption standards.

1. As this Court noted in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995), the presence of an express preemption provision does not "entirely foreclose[] any possibility of implied pre-emption." The latitude for supplementary implied preemption, however, differs greatly depending upon the type of implied preemption and the

type of express provision at issue. In this case, where preemption is being implied only to further an abstract purpose imputed to Congress, and the relevant express provision precisely defines the preemptive force of federal law, proper analysis does not support a finding of implied preemption.

Conflict between state and federal law that renders it "impossible for a private party to comply with both state and federal requirements," *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990), most easily trumps an express preemption provision. Here, preemption is supported by an elementary principle of fairness, namely, that a person under the concurrent jurisdiction of two coordinate sovereigns should not be forced by one to do something prohibited by the other. Just as the principle that individuals should be able to plan their conduct according to knowable law leads to the strong judicial presumption against statutory retroactivity, *see, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), so this principle leads to a strong presumption in favor of preemption. This presumption, when applicable, counters and outweighs the general presumption against preemption, and should require for rebuttal a clearer statement than is provided by a general preemption clause.[6]

By contrast, preemption should rarely be implied beyond the scope of an express preemption provision

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[6] In theory, the Safety Act could provide an occasion for application of this type of preemption. In the unlikely event that an automaker were found liable under state common law for manufacturing an automobile to a specification *mandated* by an established federal safety standard (if, for example, liability was based on a finding that a headlight of the minimum brightness mandated by the federal safety standard was excessively bright), a court might be justified in finding that the federal standard impliedly preempted state law, even though section 1397(k) provides that compliance with a federal standard never exempts anyone from common-law liability. Of course, no such conflict is presented by this case.

merely on the basis that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). After all, every statute reflects a compromise between competing purposes, which may include uniformity or flexibility, on the one hand, and preservation of established law affording compensation to injured parties, on the other. The compromise struck between those purposes is best reflected in the text of the statute itself, including any provision defining the scope of preemption. Thus, it is a mistake to construct from a substantive statutory provision or from legislative history, some abstract purpose that purportedly justifies overriding another provision of the same statute. As this Court has noted, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987); *see Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986).

The case for implying preemption to further some purpose imputed from a substantive statutory provision is even weaker when, as in the case of the Safety Act, the express clauses governing preemption do not purport either to preempt all conflicting state law or to save it, but instead strike a specific compromise. When implying preemption from a substantive provision in the face of a universal savings clause, courts will often refer to the "commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). The assumption underlying that canon of construction is that general clauses framed in absolute terms are often boilerplate that statu-

tory drafters have not measured against the more thoroughly considered substantive provisions. That assumption does not apply when, as here, the drafters have crafted language that indicates the precise balance struck between preemption and preservation of state law. In that case, the statutory language "provides a 'reliable indicium of congressional intent with respect to state authority,'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)), leaving no room for supplementary implied preemption.

2. In this case, the legislation and regulations concerning occupant crash protection provide no evidence that Congress or the Secretary of Transportation intended to create a specific exception to the general rule that federal safety standards do not preempt the state common law of torts. The principal legislation purportedly supporting implied preemption is 15 U.S.C. § 1410b, which Congress passed in 1974. *See* Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. 93-492, Title I, § 109 (1974), 88 Stat. 1470, *reprinted in* 1974 U.S.C.C.A.N. 1687, 1701-04; *Taylor*, 875 F.2d at 826 (discussing section 1410b); *Pokorny*, 902 F.2d at 1123-24 (same). Section 1410b placed limitations on the Secretary of Transportation's authority to promulgate an occupant crash protection regulation that required or allowed compliance by any restraint system other than a seat belt system.

The limitations, however, were merely procedural rather than substantive, and had lapsed by 1977. Initially, section 1410b provided that the Secretary had to follow a special procedure when promulgating an occupant crash protection standard that required or permitted compliance by means of anything other than a seat belt system. *See* 15 U.S.C. §§ 1410b(b)(3)(B), 1410b(c). The procedure specified was designed principally to give Congress the

opportunity to exercise a "legislative veto." [7] *See* 15 U.S.C. § 1410b(d). In 1977, the Secretary of Transportation used this procedure to issue a standard that required automakers to phase in passive restraints between 1981 and 1983, and that allowed manufacturers to use airbags to satisfy the passive restraint requirement. *See* Federal Motor Vehicle Safety Standard Occupant Restraint System, 42 Fed. Reg. 34,289 (July 5, 1977). Congress chose not to exercise its authority under section 1410b's legislative veto provision, and the regulation became law. *See* 49 C.F.R. § 571.208 (1977). When that occurred, a special provision in section 1410b lifted its procedural limitations with respect to any future occupant crash protection standard promulgated by the Secretary.[8] Thus, in 1977 section 1410b became a dead letter. It had been designed to give Congress a one-shot opportunity to consider a legislative veto of a safety standard requiring or permit-

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[7] This Court declared the legislative veto process unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). By then, however, as explained immediately below, section 1410b no longer gave Congress a legislative veto opportunity.

[8] Section 1410b(3)(C) provided:

> Paragraph (2) [which prevented the issuance of safety standards requiring occupant crash protections other than seat belts] shall not apply to a Federal motor vehicle safety standard if at the time of promulgation of such standard (i) the 60-day period determined under subsection (d) of this section has expired with respect to any previously promulgated standard which the Secretary has elected to promulgate in accordance with subsection (c) of this section, and (ii) both Houses of Congress have not by concurrent resolution within such period disapproved such previously promulgated standard.

15 U.S.C. § 1410b(3)(C) (1982). Once the 1977 standard became law, it would be a conforming "previously promulgated standard" with respect to any future occupant crash protection standard, thus freeing that standard from any strictures imposed under section 1410b.

ting compliance by means of non-seat belt systems, and Congress declined to take that opportunity.[9]

3. The version of the occupant crash protection regulation in force at the time Ms. Geier's automobile was designed and manufactured likewise provides no basis for creating a nontextual "airbag exception" to the Safety Act's express preservation of common law liability. That regulation, Standard 208, provides manufacturers with three alternative means of compliance, two of which require some form of "passive" or "automatic" restraint such as airbags, automatic seat belts, or passive interiors, and one which requires only manual seat belts. *See* 49 C.F.R. § 571.208, S4.1.3.1 (1986). The courts that have implied preemption of airbag claims reason that this regulation evinces an intent not only to give manufacturers flexibility in complying with federal law, but also to shield them from any potential state common-law consequences of choosing one option or another. *See, e.g.*, Pet. App. 14a-15a. The regulation's provision of alternatives, how-

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[9] In *Taylor*, the Eleventh Circuit cites as additional support for implying preemption two Department of Transportation appropriations bills which provided that "'[n]one of the funds appropriated [for the Department of Transportation] shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system).'" *Taylor*, 875 F.2d at 826 (quoting Department of Transportation and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-335, § 317, 92 Stat. 435, 450 (1978)); *see* Department of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-131, § 317, 93 Stat. 1023, 1039 (1979).

There are a plethora of problems with implying state common law preemption from federal appropriation riders. Without considering all of them, it suffices for this case to say that if one infers from these provisions a Congressional objection to airbags in 1978 and 1979, then one should infer from the absence of similar provisions in subsequent appropriations bills a withdrawal of that objection in 1980, seven years before the manufacture of the Honda Accord here at issue.

ever, provides no basis for creating a unique "liability-free zone" around airbags.

As an initial matter, the Safety Act nowhere grants the Secretary the authority to decide on a component-by-component basis whether and to what extent to immunize automakers from common-law liability. Rather, it authorizes the Secretary to issue "minimum standards for performance" and clothes those standards with uniform preemptive force. *See* 15 U.S.C. § 1392(a) (authorizing the Secretary to promulgate "motor vehicle safety standard[s]"); 15 U.S.C. § 1391(2) (defining "motor vehicle safety standards" as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance"); 15 U.S.C. § 1392(d) (defining scope of preemption for established standards); 15 U.S.C. § 1397(k) (preserving state common-law claims). Thus, were the Secretary to decide explictly to immunize automakers from common-law liability regarding some particular component—whether airbags, or tempered-glass windshields, or breakaway engine mounts, or anything else—it seems almost certain that the Secretary would be acting *ultra vires*.

In any event, neither the language and structure of Standard 208 nor its regulatory history provides any evidence of such a decision. Because the provision of alternatives in Standard 208 is entirely compatible with an intent to provide flexibility under federal law but *not* to have any effect on state law, no inference in favor of preemption can be drawn from the mere fact that manufacturers need not install airbags to meet Standard 208. Hence, to draw such an inference, courts must rely on extratextual regulatory history about the Secretary's motives in providing the alternatives, such as the supplementary information provided in the Federal Register upon promulgation of the standard. Arguably, evidence of agency motives that failed to find any expression in the promulgated standard itself should never be a sufficient

basis for creating an exception to an explicit statutory provision preserving common law liability. Even assuming that such evidence could conceivably be sufficient, however, the motives revealed by the regulatory history in this case cannot further the cause of selective implied preemption.

First, one of the Secretary's expressed motives—a doubt whether the Safety Act even authorizes the promulgation of an airbag requirement—weighs against drawing any inference of an intent to preempt. *See* Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 29001 (1984). The Safety Act only authorizes the establishment of performance standards, which specify, for example, the maximum pressure to which an automobile occupant's body can be subjected; it does not authorize the Secretary to direct the design of devices that will meet those standards. *See* 15 U.S.C. § 1392(a) (authorizing the Secretary to promulgate "motor vehicle safety standards"); 15 U.S.C. § 1391(2) (defining "motor vehicle safety standard" as "a minimum standard for motor vehicle equipment *performance*") (emphasis added). Thus, the fact that Standard 208 provides manufacturers the flexibility to use airbags, automatic seat belts, or conceivably some other technology to provide passive restraint, is traceable to the fundamental approach of the Safety Act, and cannot be used to infer an intent to immunize manufacturers from common-law tort liability.

Second, the Secretary expressed a desire to provide consumers with a choice between different occupant crash protection schemes, and to be able to gather comparative data about the use of different schemes. *See* Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 29001 ("Under the rule being issued, if people have concerns about airbags, they can purchase automobiles that use automatic belts."); *id.* ("Widespread

use of both systems is the only way to develop definitive data."). Yet Standard 208, as promulgated, does not guarantee consumer choice or the widespread use of different systems. It allows automakers to make all of their cars with manual seat belts only, or with airbags only.[10] The only method of guaranteeing diversity would be to require minimum production quotas for each option. If Standard 208 required an automaker to produce some percentage of its cars with manual seat belts only, presumably the stronger "actual conflict" implied preemption would protect it from common law liability for failing to install airbags. Because Standard 208 as promulgated does no such thing, the Secretary's desires remain unaccomplished, and cannot be used to support implied preemption.

Third, most of the Secretary's other reasons for allowing automakers to install crash protection systems other than airbags are the types of reasons that the Safety Act anticipates will shape the limitations of every Federal Motor Vehicle Safety Standard. Because the Safety Act also provides that such standards will not preempt state common law, Congress cannot intend these reasons to count toward implied preemption. The Safety Act requires the Secretary to consider "whether a proposed standard is reasonable, practicable, and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed." 15 U.S.C. § 1392. The Secretary expressed doubts whether airbags would be cost effective, *see* Federal Motor Vehicle Safety Standard; Occupant Crash Protection, 49 Fed. Reg. 28991-92, 29000-01 (1984) and whether some consumers

[10] For the year in which Ms. Geier's car was manufactured, Standard 208 required automakers to equip at least 10% of their cars with passive restraints. *See* 49 C.F.R. § 571.208 S4.1.3.1.2 (1987). This requirement, however, does not guarantee diversity, since it provides no maximum percentage for passive restraints.

might fear airbags, *see id.* at 29001. These are the type of concerns that might have prompted the Secretary simply to require manual seatbelts only, in which case the occupant crash protection standard would not have the three-option scheme that has impressed all of the courts that found implied preemption; the Secretary's decision to include options that could be satisfied by airbags demonstrates only that these concerns were weak. More generally, they are the type of concerns that undoubtedly shape every safety standard the Secretary issues, from bumpers to illumination systems. If the mere recitation of such concerns were deemed sufficient to establish the Secretary's intent to displace state common law, then every promulgated standard would preempt common law, rendering section 1397(k) a nullity. Thus, the expression of such concerns in the regulatory history of Standard 208 cannot be used to build a case for selective implied preemption of airbag omission claims.

Finally, the few sentences in the regulatory history suggesting that automakers should retain some discretion over the type of passive restraint they install are simply too equivocal to provide evidence of an intent selectively to preempt state common-law tort liability when airbags are at issue. *See, e.g., id.* ("[B]y restricting the manufacturers, the Department runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems."). At the time the relevant version of Standard 208 was promulgated in July 1984, the Safety Act's express savings clause had been uniformly held by a federal court of appeals and three state courts of last resort to preserve common law actions in the face of the federal regulatory scheme. *See Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968); *Volkswagen of America, Inc. v. Young*, 321 A.2d 737, 746 (Md. 1974); *Arbet v. Gussarson*, 225 N.W.2d 431, 438 (Wis. 1975); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*,

345 N.E.2d 683, 688 (Mass. 1976).[11] Against this background, a few statements about "flexibility" that make no mention of preemption hardly give the States fair notice that their ability to provide relief for negligent, injurious conduct is about to be extinguished. Thus, the political process would be ill-served by finding implied preemption on such a tenuous basis. *Cf. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985) ("The political process ensures that laws that unduly burden the States will not be promulgated.").[12]

In sum, neither federal legislation, nor Standard 208, nor the regulatory history of that standard, provides any basis for selectively implying preemption of airbag claims

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[11] Moreover, just a few months earlier, the Ford Motor Company had settled a state common-law airbag omission claim during trial for $1.8 million, making common-law liability for airbag omission a live issue, as well publicized in a feature article in The Wall Street Journal. *See* Amal Nag, *Ford Settles Lawsuit Over Accident Victim For $1.8 Million Total*, The Wall Street Journal 17 (March 16, 1984).

[12] The "phase-in" of federal passive restraint requirements over a period from 1986 to 1989 similarly provides no basis for implying preemption of state tort liability regarding an automobile manufactured in 1987. The version of Standard 208 promulgated in 1977 required a phase-in of passive restraints by 1983. The Secretary rescinded that requirement in 1981, but this Court held in 1983 that the rescission was arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983). At that time, the Court noted that "[f]or nearly a decade, the automobile industry waged the regulatory equivalent of war against the airbag and lost—the inflatable restraint was proven sufficiently." *Id.* at 49 (footnote omitted). When the Secretary, in the wake of *State Farm*, reinstated the passive restraint requirements in 1984, she could not, for reasons of fairness given her predecessor's vacillation, assess penalties against automakers for failing to equip cars with passive restraints overnight. Yet that unjustified vacillation should not necessarily have prevented automakers from recognizing that their common-law duty of due care required the installation of passive restraints before 1987, nor should it prevent persons injured by the automakers' breach of that duty from seeking compensation for their injuries.

in the face of the Safety Act's express preservation of all common-law claims regarding automobile safety.

CONCLUSION

The judgment of the court of appeals should be reversed.

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QUESTION PRESENTED

Whether a statute that expressly saves from preemption "any common law liability" nonetheless preempts state tort law by merely precluding states and their political subdivisions from establishing motor vehicle safety standards that differ from those imposed by the federal government.

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INTEREST OF *AMICI CURIAE*

Amici curiae, the undersigned Attorneys General of the States of Missouri, Arizona, California, Colorado, Connecticut, Delaware, Iowa, Kansas, Montana, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, submit this brief in support of petitioners Alexis Geier, *et al.*[1] *Amici* have a strong interest in preserving the appropriate balance of authority between the States and the federal government. They regularly defend not just statutory but common law rights of states, state officials, and state subdivisions -- rights that are threatened by the rule adopted by the U.S. Court of Appeals for the District of Columbia Circuit. Attorneys general use powers granted both by statute and by the common law to protect the public health, safety, and welfare of the citizens of their states. The use of those powers is threatened because the holding of the court below deprives the state common law of protection expressly granted by Congress. According to that court, common law remedies conflict with a statute that on its face precludes the states only from establishing automobile safety standards in competition with those set by federal statutes and regulations, while expressly preserving common law liability.

The common law rights that the attorneys general use and seek to protect have developed through long processes of evolution, often independent of legislative enactment. The common law rights include torts that derived from English law, survived the colonial period and the ratification of the Constitution of the United States, and continue to evolve to balance the needs and rights of victims in our modern world.

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[1] Some portions of this brief were originally drafted by Jonathan S. Massey, a sole practitioner in the District of Columbia. Mr. Massey is not counsel for any party.

Torts provide redress for injuries -- regardless of whether those injuries were caused by legal or illegal acts. Again, the *amici* have a significant interest in preserving the availability of that avenue for relief -- and in preventing its erosion through allegedly implicit preemption, especially when in the same statute Congress included language that led the states and potential plaintiffs to believe that tort remedies remained intact.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves an aspect of the common law that redresses injury -- one that protects the health and safety of a state's citizens, albeit through relief after the fact. This Court has repeatedly said that preemption of state efforts to protect health and safety "should not be lightly inferred." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (internal quotation omitted). Local laws relating to health and safety are "those 'the Court has been most reluctant to invalidate.'" *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (citation omitted).

Even outside the health and safety context, this Court has declined to affirm preemption unless it finds "an unambiguous congressional mandate" to preempt state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963). Ambiguity is not tolerated; "pre-emption will not lie unless it is the 'clear and manifest purpose of Congress.'" *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992). "Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." *Bethlehem Steel Co. v. New York State Labor*

Relations Bd., 330 U.S. 767, 780 (1947) (Frankfurter, J., dissenting).

Here, the Court should not begin its analysis with the preemption clause contained in the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381, *et seq.*[2] Rather, it should start with the clause most pertinent to the question of the continued validity of common law remedies: the portion of 15 U.S.C. § 1397(k) that expressly saved common law remedies from preemption. Because there is nothing in the Safety Act to limit that savings clause so as to exclude traditional tort remedies, the express language of that clause dictates the result in this case.

If the Court were to consider in detail the Safety Act's preemption clause, 15 U.S.C. § 1392(d), it would find little to support the conclusion reached below. The language is prospective in every respect, addressing affirmative state laws or regulations that attempt to set manufacturing standards that differ from those set by Congress and the Department of Transportation.

That Congress would choose to preempt state efforts to set differing standards, yet permit tort actions based on individual sets of facts, is a logical result of the key difference between the type of regulation embodied in the Safety Act and the remedy established by common law torts. The former is prospective, trying to prevent injury. The latter

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[2] The provisions at issue here have been recodified to Title 49 in connection with the assignment of authority to the Department of Transportation. Thus the "savings" clause (*see* p. 5, *supra*) contained in 15 U.S.C. § 1397(k) is found at 49 U.S.C. § 30103(e). The "preemption" clause contained in 15 U.S.C. 1392(d) (*see* p. 9, *supra*) is found at 49 U.S.C. § 30103(b). Following the pattern of the petition for writ of certiorari, amici use the original Title 15 references.

is retrospective, trying to redress injury. It is implausible here, as it was in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), to suggest that Congress intended to leave injured persons without a remedy, when it merely barred competing state standards and expressly reserved the availability of common law liability.

The course chosen by the lower courts here and in similar cases demonstrates the need for this Court to clarify the limited scope of the implied preemption doctrine. That doctrine should not be applied at all where, as here, there is a provision in the statute preserving common law remedies. But even where it is applied, the doctrine must be limited if it is to avoid conflict with the constitutional concerns of federalism and with the need to preserve both regulatory and post-injury redress as key elements in our efforts to protect the health and welfare of all Americans.

ARGUMENT

I. The states and their residents were entitled to rely on the savings clause in the Traffic and Motor Vehicle Safety Act to protect their ability to assert common law damages claims.

The element that most clearly distinguishes this case from *Cipollone* and other recent preemption cases is the presence in the Safety Act of a "savings clause," by which Congress declared the continued viability of state law regardless of how the preemption language elsewhere in the Act is construed. The states and their residents were entitled to rely on the presence of that clause as they initially considered whether to support or to fight the enactment of the Safety Act. They were entitled to rely on that clause as they purchased and drove automobiles after the Act was passed.

And they should be entitled to rely on that clause now, when manufacturers seek to read the Safety Act's preemption provision so broadly that it swallows the savings clause whole.

The savings clause is, in essence, an *anti*-preemption provision. It expressly preserves state common law remedies *despite* the presence of a preemption clause in the same statute: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any common law liability." 15 U.S.C. § 1397(k). The plaintiff here asserted that the defendant had "common law liability."

The Department of Transportation recognized, when promulgating the final rule regarding automatic restraints in 1985, that tort liability remained a part (*amici* would argue, a critically important part) of the scheme to protect automobile occupants. Thus Secretary of Transportation Dole pointed to "potential liability" to rebut claims that manufacturers would always adopt "the least expensive alternative" among those permitted by the rule. 49 Fed. Reg. 28,962-29,010, at 29,000 (1984). Insurers had commented on "the potential of automatic restraint systems to reduce product liability claims" (*id.* at 28971), never suggesting (at least according to the Department's summary of comments) that the 1966 Safety Act statute had eliminated that potential. Others expressly pointed out that despite the Safety Act, "[p]eople whose crash injury would have been averted had the car been equipped with an air bag can sue the car manufacturer to recover the dollar value of that injury." *Id.* at 28972.

Those observations were entirely rational because the savings clause is unambiguous. It preserved manufacturers' liability for state common law torts. Its presence in the

statute prevents this Court from having to reach the question of whether the Safety Act's preemption clause can be construed broadly, consistent with constitutional mandates. It prevents the Court from having to call upon its Tenth and Eleventh Amendment precedents, or applying constitutionally-required, but judicially-defined, protections for state sovereignty, such as those addressed in *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144, 170 (1992); *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); and *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999).

To now, years after it was enacted, restrict the interpretation of the savings clause so severely that it has no real meaning would be to belatedly deprive the states of their ability to play their essential role in the legislative process. The States *qua* States, and through their representatives in the central government, play a critical, if indirect, role in the crafting of federal legislation. James Madison explained that the federal government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." THE FEDERALIST, No. 46, p. 332 (B. Wright ed. 1961). Madison placed particular reliance on the equal representation of the States in the Senate, which he described as "at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty." THE FEDERALIST, No. 62, p. 408 (B. Wright ed. 1961). As the Chief Justice has remarked, "[t]he tacit postulates [of the constitutional plan] are as much engrained in the fabric of the document as its express provisions." *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, C.J., dissenting).

One of the vital "procedural safeguards inherent in the

structure of the federal system," *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 552 (1985), is the requirement of a crystal-clear statement of Congressional intent before the States are stripped of the right to govern themselves and to ensure their residents redress for injuries caused by unsafe products.

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 480 (2d ed. 1988). *See also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 871 n.12 (1995) (Thomas, J., dissenting) (quoting the same sentence of AMERICAN CONSTITUTIONAL LAW and describing *Gregory* as "applying this argument"); and Judge Kenneth Starr & Judge Patrick E. Higginbotham, *et al.*, *The Law of Preemption: A Report of the Appellate Judges Conference* 50-51 (1991) (The requirement of a "clear legislative intent to preempt" is also "consistent with the Court's reliance on clear statement rules in other areas of the law.").

By reversing the decision below, this Court will merely confirm that Congress, by choosing to preserve state common law rights, recognized the importance of the "federalist structure of joint sovereigns" and appropriately addressed the "proper balance between the States and the

Federal Government." *Gregory v. Ashcroft*, 501 U.S. at 459.

II. The preemption provision in the Safety Act would not have the broad preemptive effect as held by the court below even in the absence of a clause preserving common law remedies.

The courts that blazed the path followed by the court below held that the Safety Act's preemption clause was entirely dispositive. To reach that conclusion, each of those courts had to run roughshod over both the savings clause and the common law of the various states. Even without the presence of the savings clause, the preemption clause would have to meet the high standard this Court sets for Congress when it acts to deprive states and their residents of longstanding rights. Whether that standard is phrased as requiring an "unambiguous congressional mandate" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 147), a "clear and manifest purpose" (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230), or "drastic clarity" (*Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. at 780 (Frankfurter, J., dissenting)), it is not met by the language in the Safety Act.

The Safety Act's preemption provision does not speak of law "relating to" a subject, as do statutes such as the Employee Retirement Income Security Act (ERISA) and the Airline Deregulatory Act. *See, e.g., American Airlines v. Wolens*, 513 U.S. 219, 223 (1995), *citing*, 29 U.S.C. § 1144(a) (ERISA "provides for the preemption of state laws 'insofar as they . . . relate to any employee benefit plan'"); and 49 U.S.C.App. § 1305(a)(1) (Deregulation Act preempts laws "relating to rates, routes, or services of any air carrier"). Rather, it only speaks of "Federal motor vehicle safety standards" and only precludes states from establishing higher

"standards":

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). The language does not fully explain the scope of its application to state laws. But both read alone and read with the definitions found in 15 U.S.C. § 1391, it provides some clear markers for judicial construction.

1. Use of the phrase "State or political subdivision of a State" indicates that Congress was referring to positive state law, not to common-law claims. This is not a phrase that Congress would have used to refer to the bodies that issue or apply the common law. Although the term "state law" may include common law as well as statutes and regulations, *Cipollone*, 505 U.S. at 522 (plurality opinion), neither a court nor a jury in a state court case (much less a jury in a federal court case applying state law) is typically referred to as a "State or political subdivision of a State." We are aware of no practice or precedent for saying that a "State" "establishes" a "standard" by applying common law tort principles to a particular set of facts. By comparison, when legislation is signed into law, when regulations are promulgated, or when ordinances are adopted, it is often said that a "State" (or a county or city) has changed its law. That is the logical limit on preemption here.

2. States do not "establish" standards by means of the common-law tort system. The general norms embodied in the common law have been "established" over hundreds of years. Nor do individual verdicts "continue in effect" any form of requirements. The use of "continue" does not suggest the clause covers the ever-evolving concepts of common law torts. Nor does "continue" fit the repeated application of tort principles to unique sets of facts. Tort awards simply do not fit the mold of positive, concrete acts that the words "establish" or "continue" contemplate.

3. The word "standards," read in context, suggests positive enactments, not common law claims. But unlike "establish," the meaning of "standards" is evident from both its repeated use and the definition section of the Safety Act. The word is used three times in § 1392(d). In two instances -- with respect to federal safety standards -- it unquestionably means positive enactments, not court actions for damages. That is consistent with the definition section of the Safety Act. A "motor vehicle safety standard" is defined as

> a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

15 U.S.C. § 1391(2). Only once, in the reference to state-law requirements, is the word "standards" even arguably ambiguous. It is "a basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). And that meaning here is a prospective standard with objective criteria -- not the rules governing recovery for common law torts.

4. Common-law claims do not establish or continue requirements "with respect to [a] motor vehicle" at all, because a defendant is always free -- indeed, sometimes is expected -- to pay damages rather than to modify its conduct. The only action ever required by a tort claim is the payment of a damages judgment -- not action with respect to a motor vehicle. Thus, a defendant is always able to comply with the federal standard and to pay compensation to those injured by its misconduct. There is no possibility of incompatible legal commands in ordinary damages suits.

Again, though, this commonsense understanding of the preemption provision is fortified by the savings clause. In light of that enactment, it would defy Congressional intent to resort to implied preemption analysis. This is indeed an instance where "there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation." *Cipollone*, 505 U.S. at 517.[3]

The effort by the court below to place the round peg of a common law tort into the square hole of an equipment or performance standard should be rejected. Until Congress repeals the savings clause *and* modifies the preemption clause to match the nature of a common law remedy, the availability of such remedies must remain a matter of state, not federal law.

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[3] Thus, five state courts of last resort have properly held that no-airbag claims are not subject to either express or implied preemption. *Amici* seek to preserve the holdings in *Ford Motor Co. v. Tebbets*, 665 A.2d 345 (N.H. 1995), *cert. denied*, 516 U.S. 1072 (1996); *Wilson v. Pleasant and General Motors Corp.*, 660 N.E.2d 327 (Ind. 1995); *Munroe v. Galati*, 938 P.2d 1114 (Ariz. 1997); *Minton v. Honda of America Mfg., Inc.*, 684 N.E.2d 648 (Ohio 1997); and *Drattel v. Toyota Motor Corp.*, 699 N.E.2d 376 (N.Y. 1998).

III. The choice made by Congress to retain common law remedies while prohibiting regulatory actions flows from an essential distinction between the Safety Act and the common law: the former prevents injury; the latter redresses injury.

Congress' decision not to preempt state common law is hardly surprising. Here, as in many other contexts, Congress chose to address prevention of harm through the imposition of nationwide standards on manufacturers of goods placed in interstate commerce. But Congress, again, as in many other contexts, left to the states the question of redress for particular injuries.

Although awarding damages for injuries after the fact has some deterrent effects, its principal purpose is to compensate injured victims.[4] "'Over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights.'" *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (citation omitted). The tort system operates on a retrospective basis. Each case requires an examination of the particular facts regarding a particular victim and a particular tortfeasor. Tort law is tied to the goal of compensation. *See Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("Every State has a body of tort law serving" its

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[4] *See, e.g.*, Stephen Breyer, REGULATION AND ITS REFORM 176 (1982) (explaining that tort law has deterrent effects, but that "the common law, as administered by the courts, may reflect certain noneconomic or moral factors that will make it difficult to use shifts in common-law liability to achieve basically economic ends").

"compelling interest" in "ensuring that victims . . . are compensated by those who harm them.").

By contrast, statutes and regulations are typically prospective in nature. They focus not on compensating persons for injuries already sustained, but on preventing socially harmful activities. "Regulation is not designed to provide or account for compensation" to the victims of dangerous products and their families. Mary Lyndon, *Tort Law and Technology*, 12 YALE J. ON REG. 137, 172 (1995). Safety standards can only attempt to head off injuries in the future -- including injuries for which common law torts provide remedies.

The difference between the tort and regulatory systems means that a Congressional decision to prevent States from adopting conflicting positive-law enactments is entirely different from a decision to curtail the compensatory function of tort law. Even if a State cannot alter a product's design, it should be able to provide a judicial system that resolves claims for wrongful injuries to its citizens and to decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for those injuries it could have prevented. To hold otherwise collapses the tort system's secondary purpose, deterrence, into its primary purpose, relieving the burden of those injured by the decisions and acts of others.

Recognizing the important distinction between regulation and the tort system, this Court has traditionally held that statutes like the Safety Act do not cut off victims' rights to fair compensation under state law. *E.g.*, *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-64 (1954) (where Congress "neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by

tortious conduct," this Court refused "to cut off the injured respondent from this right to recovery," observing that to do so would "deprive it of its property without recourse or compensation" and "in effect, grant petitioners immunity from liability or their tortious conduct."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (where there was "no indication that Congress even seriously considered precluding the use of [tort] remedies," this Court declined "to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."). Recently, in *Medtronic v. Lohr*, a plurality observed that an argument that "Congress effectively precluded state courts from affording state consumers any protection from injuries resulting from a defective medical device" would be "implausible." 518 U.S. at 486 (Stevens, J.). Moreover, because there is no suggestion that the Act created an implied private right of action, Congress would have barred most, if not all, relief for persons injured by defective medical devices. *Id.* at 487.

Rather than compete, the regulatory system and the tort system complement each other, with one system attempting to anticipate problems before they occur and the other providing relief when consumers suffer injuries. Indeed, there is significant cross-fertilization between the tort system and regulation. For example, information obtained in individual tort suits often informs the judgment of federal regulators about whether existing standards are adequate or whether new protections should be proposed. "Obtaining accurate, relevant information" often constitutes a "central problem" for an administrative agency. Stephen Breyer, REGULATION AND ITS REFORM 103 (1982); *see also id.* at 112 ("the information problem is central and endemic to the standard-setting process"). As one scholar observed, tort litigation is "an important social learning mechanism" because it generates data about the risks of new technologies.

Lyndon, *supra*, 12 YALE J. ON REG. at 176. "[T]ort law's signals contain necessary basic messages that are not delivered through any other medium," "offer[ing] advantages that we need to account for before preempting tort law." *Id.* Reading regulatory statutes as preempting common-law claims for damages would sacrifice the important information-gathering function of the tort system.

At bottom, the contention that government acquiescence in a particular manufacturer's design should insulate it from tort liability -- even in the absence of an explicit Congressional statement to that effect -- is an argument about substantive social policy, not preemption law. The defendant's plea is one that should be addressed to elected legislatures and politically accountable executive officers, not to the courts. The States should be free to decide, as a matter of distributive justice, whether manufacturers should bear the cost of injuries resulting from devices whose design is not dicatated by federal law, but merely meets minimum federal standards.

Preemption is all the more unjustified because state tort law has *already* accommodated the defendant's concern. It is axiomatic that standards set by federal agencies are useful benchmarks for the finders of fact in particular tort cases and that compliance with federal standards is at least evidence of due care. *See generally* Restatement (Second) of Torts § 288(c).[5] Some jurisdictions go further and mandate

[5] *See also* Paul Deuffert, *The Role of Regulatory Compliance in Tort Actions*, 26 HARV. J. ON LEGIS. 175, 175 (1989) ("For a hundred years courts have considered axiomatic the common law principle that, against possible liability in tort, a defendant's compliance with governmental statutes and regulations is admissible only as evidence of the defendant's exercise of due care. Therefore, such compliance generally 'does not prevent a finding of negligence where a reasonable man would take additional precautions.'") (citations omitted).

that compliance with such standards is a conclusive defense to tort liability;[6] establishes a rebuttable presumption of non-negligence;[7] or bars punitive damages.[8]

In recent years, nearly every State has considered -- and the vast majority have implemented -- legislative reform of product liability laws. Congress itself has considered legislation on the topic. The matter should be left to the politically accountable branches. Preemption law should not become, as a weapon against the States' historic role in allocating the cost of injuries, the modern-day equivalent of *Lochner v. New York*, 198 U.S. 45 (1905).

IV. To preserve the position of the states in our federal system, and to obligate Congress to take responsibility for preempting state laws, this Court should clarify the limited scope of the implied preemption doctrine.

In *Cipollone*, this Court corrected the Third Circuit's impressionistic judgment that tort suits would upset the "balance" struck by Congress in the cigarette warning statutes. In *Medtronic*, this Court corrected the sweeping preemptive effect that lower courts had accorded to the Medical Device

[6] Mont. Code Ann. § 69-4-201.

[7] *E.g.*, Model Uniform Product Liability Act § 108(A); Colo. Rev. Stat. § 13-21-403(1)(b); Kan. Stat. Ann. § 60-3304(a); Ky. Rev. Stat. Ann. § 411.310(2); N.D. Cent. Code § 28-01.1-05(3); Utah Code Ann. § 78-15-6(3).

[8] *E.g.*, Ariz. Rev. Stat. Ann. § 12-701; N.J. Stat. Ann. § 2A:58C-5(c); Ohio Rev. Code Ann. § 2307.80(C); Or. Rev. Stat. § 30.927; Utah Code Ann. § 78-18-1.

Amendments. In this case, this Court should reaffirm that express preemption is limited to the text drafted by Congress, and must be interpreted according to the conventional tools of statutory construction and with due regard for two fundamental principles.

The first is the strong presumption against preemption arising from the constitutional concerns of federalism rooted in the Tenth Amendment and in what the Chief Justice has described as "[t]he tacit postulates" of the constitutional plan. *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

The second principle is that Congress legislates against a background understanding of the significant distinction between the tort and regulatory systems. Accordingly, a Congressional decision to displace state positive-law enactments should not be equated with a decision to bar state-law tort suits for damages. Indeed, the presumption against preemption is especially strong when Congress has failed to provide a separate federal remedy for a person injured by tortious conduct, as in the Safety Act.

This Court should also reaffirm the limited scope of implied preemption. When Congress has expressly addressed the matter of preemption in a specific statutory provision whose meaning can be ascertained through the conventional tools of statutory construction -- applied with reference to the two principles outlined above -- preemption analysis should ordinarily be at an end. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (establishing "an inference that an express pre-emption clause forecloses implied pre-emption"). This Court should emphasize to the lower courts the need to avoid reliance on imprecise statutory language to eliminate decisions made by sovereign states.

When, as in this case,

> the courts preempt state laws without explicit congressional guidance, unelected and unaccountable officials substitute their preferences for those of the citizens of local communities. . . . [The courts] in effect assume a legislative role without accepting legislative responsibility.

Judge Kenneth Starr & Judge Patrick E. Higginbotham, *et al.*, *The Law of Preemption: A Report of the Appellate Judges Conference* 48 (1991). This Court, by reversing the use of implied preemption in this case, will further force Congress to accept responsibility for the choices it makes as it balances state and federal interests. Again, Congress, not the courts, must decide how or whether to implement the contemporary preference for market-oriented incentives that continually stimulate manufacturers to innovate and develop safer products.[9]

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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[9] *See* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 359 (1984) (explaining that administrative regulation is a centralized system of government control, while tort law is essentially a market-based system that employs the expertise and information already accumulated by private firms in the ordinary course of their business); Stephen Breyer, REGULATION AND ITS REFORM 105 (1982) (design standards "diminish[] incentive[s] to look for better methods" and "freeze existing technology").

Respectfully submitted,

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No. 98-1811

IN THE
Supreme Court of the United States

ALEXIS GEIER, *et al.*,
Petitioners,
v.
AMERICAN HONDA MOTOR COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AND THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amici will address the following question: Whether a civil action seeking to hold an automobile manufacturer liable under state tort law for failing to include an airbag in a vehicle that was manufactured at a time when the applicable Federal Motor Vehicle Safety Standard gave manufacturers an option as to whether to install airbags is expressly preempted by the National Traffic and Motor Vehicle Safety Act of 1966.

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INTEREST OF *AMICI CURIAE*[1]

The Alliance of Automobile Manufacturers ("Alliance") and the Association of International Automobile Manufacturers, Inc. ("AIAM") are non-profit national trade organizations whose member companies are principally engaged in the production and sale of motor vehicles. They include all of the major distributors of motor vehicles in the United States market.[2]

The vehicles that these companies distribute in the United States must comply with the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1988) (recodified at 49 U.S.C §§ 30101-30169 (1994)) (the "Safety Act"), and with the Federal Motor Vehicle Safety Standards that are adopted by the National Highway Traffic Safety Administration ("NHTSA") pursuant to the statute. Among those standards is FMVSS 208, 49 C.F.R. § 571.208 (1998) ("Standard 208"), which addresses occupant restraint systems.

The version of Standard 208 applicable to petitioners' automobile, a 1987 Honda Accord, expressly permitted

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[1] Petitioners and respondents have consented to the filing of this brief, in letters that are on file in the Clerk's office. The undersigned counsel alone have authored this brief, and no other person or entity other than the two *amici* has made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.3.

[2] The members of the Alliance are BMW of North America, Inc., DaimlerChrysler Corp., Fiat Auto S.p.A., Ford Motor Co., General Motors Corp., Isuzu Motors America, Inc., Mazda Motor of America, Inc., Nissan North America, Inc., Toyota Motor North America (Toyota Motor Sales USA Inc.), Volkswagen of America, Inc., and Volvo Cars of North America, Inc.

The members of AIAM are American Honda Motor Co., Inc., American Suzuki Motor Corp., BMW of North America, Inc., Daewoo Motor Co., Ltd., Hyundai Motor America, Isuzu Motor America, Inc., Mitsubishi Motor Sales of America, Inc., Porsche Cars of North America, Inc., Saab Cars USA, Inc., Subaru of America, Inc., Toyota Motor Sales USA, Inc., Volkswagen of America, Inc., and Volvo North America Corp.

and encouraged manufacturers to install a variety of occupant restraint systems in vehicles produced that year, of which airbags were but one option. Petitioners' legal claim is that, notwithstanding the choice granted to manufacturers by Standard 208, the States are nevertheless free to impose civil liability on manufacturers for failing to install airbags in 100 percent of the vehicles manufactured in that year. This legal claim, if upheld, would punish automobile manufacturers for carrying out an express federal policy in favor of diversity among restraint systems in 1987. It would also allow motor vehicles to be subject to a multitude of safety standards in different States.

The result would be intolerable. Motor vehicles are produced and distributed on a national scale. And, once sold, they are resold through a national wholesale market for used vehicles. If States were free to set safety standards that differ from federal standards dealing with the very same safety issues, after-the-fact through their tort law, manufacturers would have no way of anticipating which standard would eventually apply to any given car. Some States might follow the federal standard and permit but not require airbags. Some might decide that all vehicles must have airbags. A few might even decide that no vehicles should have airbags. It is doubtful at best whether the resulting uncertainty would have any positive effect on motor vehicle safety, although the litigation it would spawn would certainly increase the costs to consumers.

The resolution of the express and implied preemption issues presented in this case are therefore of great interest to *amici*. This brief will focus, in particular, on the express preemption issue.

SUMMARY OF ARGUMENT

1. The Safety Act contains an express preemption clause, 15 U.S.C. § 1392(d), which prohibits the States from establishing or continuing in effect "any safety standard" which is "not identical" to a federal motor vehicle safety standard that applies to "the same aspect of performance" of a vehicle or its equipment. The plain language of this clause makes clear that Congress established a fundamental principle of uniformity with respect to safety standards. Once the federal agency has established a safety standard with respect to a particular aspect of performance, that standard is the only safety standard with which the vehicle must comply, no matter where in the United States it may be subsequently driven or resold.

Petitioners' no-airbag claim in this case falls squarely within Standard 208, which governs vehicle occupant restraint systems. Under the version of Standard 208 that applies to petitioners' vehicle, manufacturers had a choice either to install a manual seat belt and shoulder harness system, an automatic belt passive restraint system, or a passive restraint system including an airbag. A requirement that manufacturers install airbags in all vehicles is "not identical to" a standard that says manufacturers have a choice among a variety of occupant restraint systems, of which an airbag is only one option.

2. This conclusion does not change because petitioners seek the same result through the adoption of a common-law tort standard. This Court has held that words such as "requirement" or "prohibition" in express preemption clauses include standards of care enforced through common-law damages actions. The basis for concluding that the operative language of Section 1392(d)—"any safety standard"—includes common-law standards of care is if anything even stronger, since the common law proceeds more often by articulating standards than by prescribing requirements.

Petitioners also err in asserting that interpreting "any safety standard" to include common-law standards would preempt "virtually all" common-law causes of action. Pet. Br. 24-25. The preemptive effect of Section 1392(d) extends only to common-law actions that seek to impose a standard with respect to the "same aspect of performance" addressed by a federal safety standard. Thus, claims of improper design or manufacture falling outside the performance requirements of a federal standard would not be preempted. In addition, Section 1392(d) expressly excludes from preemption state standards that seek to enforce a standard identical to a federal standard. This means that States are free to impose common-law liability on manufacturers for failing to adhere to the requirements of federal standards.

3. Section 1397(k) of the Safety Act likewise does not change the conclusion that petitioners' action is expressly preempted by Section 1392(d). That provision states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." One cannot be "exempted" from common-law liability unless one is first subject to such liability. Because Section 1392(d) deprives the States of any authority to adopt safety standards that are not identical to federal safety standards with respect to the same aspect of performance, a defendant who properly establishes preemption under Section 1392(d) is not subject to a common-law duty the breach of which could give rise to any liability.

Properly construed, Sections 1392(d) and 1397(k) each play an important role in determining when common-law claims are preempted. Where a federal standard governs an aspect of performance, Section 1392(d) establishes that the States can enforce an identical standard, but may not enforce any safety standard as to that aspect of performance, through the common law or otherwise,

that is not identical to the federal standard. By contrast, where an aspect of performance is not governed by a federal standard—even where a federal safety standard has been adopted with respect to some other aspect of performance for the specific equipment involved—Section 1397(k) makes clear that the States are free to enforce their own standards of care and impose them by means of state tort law. Specifically, Section 1397(k) establishes in these circumstances that the Safety Act does not create a federal "compliance with government standards" defense, and that such compliance does not preempt the field of state tort liability. Finally, even if a federal safety standard is in effect as to a particular aspect of performance, Section 1397(k) establishes that the States may enforce other common-law standards—under the law of contract, for example—as long as they are not related to safety.

Harmonizing Section 1392(d) and Section 1397(k) in this fashion is especially appropriate here, given the established canon that a savings provision should not be construed so that the Act "destroy[s] itself." See *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). Petitioners' interpretation of Section 1397(k), which would exempt all common law from preemption, destroys the uniformity of safety standards commanded by Congress. Harmonizing these two provisions as suggested herein is not only consistent with the Act's language and structure; it also preserves the Act's fundamental policy of uniformity.

ARGUMENT

The court of appeals in this case addressed two theories as to why petitioners' legal action is preempted by the Safety Act and Standard 208: express preemption and implied preemption. The court ultimately concluded that it was not necessary to resolve the express preemption issue because it found that petitioners' action conflicts

with Standard 208, and hence is preempted by implication. *Amici* concur fully in the lower court's conclusion and reasoning with respect to implied preemption. Nevertheless, *amici* also believe that the judgment below can be affirmed on the alternative theory of express preemption, which was also raised below by respondent American Honda Motors Co. The purpose of this brief is to discuss more fully the legal basis supporting the express preemption theory.

I. THE PLAIN LANGUAGE OF SECTION 1392(d) PREEMPTS A STATE SAFETY STANDARD THAT WOULD MANDATE THE INSTALLATION OF AIRBAGS IN VEHICLES WHEN THE APPLICABLE FEDERAL STANDARD MADE AIRBAGS OPTIONAL.

The Safety Act includes an express preemption clause, 15 U.S.C. § 1392(d). The first sentence of that clause sets forth the scope of state activity that is preempted, and is followed by two sentences setting forth exceptions. Because the language of the clause is critical to the express preemption argument, we set it forth here in full:

> [1] Whenever a Federal motor vehicle safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. [2] Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. [3] Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. 1392(d).[3]

1. As is obvious from its language, Section 1392(d) enacts a fundamental federal policy of *uniformity* with respect to certain key motor vehicle safety standards. Under the clause, where the federal government has established a standard with respect to a particular safety issue, the States are prohibited from adopting any safety standard that is "not identical to the Federal standard." Thus, Congress decreed that when a federal safety standard is in effect with respect to "an aspect of performance" of a vehicle or item of equipment, there shall be only one safety standard with which the vehicle must comply—and that is the standard set forth in the federal safety standard.

This policy of uniformity is confirmed by the second and third sentences of the preemption clause. The second sentence recognizes a narrow exception to the express preemption created by the first sentence, to wit, where States are seeking to enforce safety standards that are "identical to a Federal safety standard." This reveals that Congress had no objection to state enforcement of safety standards as such. See S. Rep. No. 89-1301, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. The point of the preemption clause was not to confer a federal monopoly on enforcement, but to assure that, whoever does the enforcing, there will be a single uniform standard applied once a federal safety standard is in effect.

The third sentence also confirms the importance of uniformity by recognizing another narrow exception for

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[3] The recodified version of the express preemption clause uses fewer words, but is to the the same effect. *See* 49 U.S.C. § 30103(b) (1994). Following the lead of the lower court and the parties, we refer in this brief to the earlier version of the Act.

procurement decisions by governmental authorities. This sentence clarifies that governmental authorities are free to establish "safety requirement[s]" for vehicles they purchase for their own use (such as highway patrol cars) that reflect a "higher standard of performance" than the federal safety standards. It is telling that Congress thought it necessary to specify that state and local governmental entities have authority to enter into contracts for vehicles that have different safety requirements than are required by federal standards. This underscores Congress's understanding that, whenever a federal standard exists with respect to a particular safety issue, the preemption clause otherwise mandates the strictest uniformity in governmental standards.

Congress adopted this policy of uniform safety standards to prevent the motor vehicle market from being balkanized by a proliferation of different safety standards in different jurisdictions. As the Senate Report observed in explaining the rationale for the express preemption clause: "The centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." *Id.* Although divergent standards might cause little disruption in markets involving products having a fixed location or products and services having a limited geographic distribution, such a regime would wreak havoc with products manufactured and distributed on a national scale. Motor vehicles, in particular, are typically mass-produced on assembly lines in one or two locations and then distributed throughout the fifty states. After they are first sold, they are often driven to different jurisdictions or resold through the national wholesale market for used cars. Subjecting such a product to "50 standards in 50 different States" would be "chaotic" and "unthinkable." 112 Cong. Rec. 14253 (1966) (statement of President Johnson).

To implement this policy of uniform national safety standards, the Safety Act confers authority on the Secretary of Transportation to adopt motor vehicle safety standards that regulate the design, construction, and performance of motor vehicles and associated equipment. See 15 U.S.C. §§ 1392(a), 1391(1) & (2).[4] The Safety Act does not disregard the role of the States in the development and enforcement of these standards. The statute requires the Secretary to "consult with . . . State or interstate agencies" when establishing a federal safety standard. *Id.* § 1392 (f)(2). And, as expressly recognized in § 1392(d), the States are free to enforce the federal standards after they are adopted. But the plain language of the express preemption clause and the structure of the Act make clear that once a federal safety standard is established, that standard serves as the nationally uniform standard for all vehicles it covers.

2. To understand the proper application of Section 1392(d) in this case, it is useful to begin by considering what would have happened if the District of Columbia (which the Act treats as a State, see 15 U.S.C. § 1391(8)), had adopted an ordinance directing that all 1987 model automobiles in the District, such as the Honda involved in this case, include an airbag.

The version of the federal standard that addresses occupant restraint systems, Standard 208, took effect in 1984. See Federal Motor Vehicle Safety Standard, 49 Fed. Reg. 28,962 (1984) (codified at 49 C.F.R. pt. 571). With respect to 1987 model vehicles, Standard 208 expressly

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[4] The Secretary's statutory authority to adopt safety standards has been delegated to NHTSA, which is the expert agency with respect to motor vehicle safety. *See* 49 C.F.R. § 1.50(a) (1998). Over the years, NHTSA has exercised this authority by adopting numerous regulations imposing specific safety standards in many different areas. *See* 49 C.F.R. §§ 571.101-.500 (1998). A manufacturer is subject to federal civil penalties and injunctive relief for failure to comply. *See* 15 U.S.C. §§ 1398(a), 1399(a).

authorized and encouraged manufacturers to provide a variety of occupant protection systems as the best means of promoting safety. See, *e.g.*, 49 C.F.R. § 571.208 (1998). These included manual lap and shoulder belt systems as well as passive restraint systems, *i.e.*, systems that require no action by the occupant to make the system operational after the ignition has been turned on. The authorized types of passive restraint systems included both automatic seat belts and airbags as well as other passive technologies. *Id.* Standard 208 further required during this period that manufacturers of passenger cars phase in progressively higher percentages of cars having passive restraint systems. *Id.* With respect to the 1987 model year, each manufacturer was required to install some form of passive restraint in at least ten percent of its passenger cars. See *id.*, S4.1.3.1 (1998).[5]

The occupant restraint system built into petitioners' 1987 Honda, a manual three-point lap belt and shoulder harness, is one of the systems explicitly authorized by Standard 208 for vehicles manufactured at that time. Thus, petitioners' vehicle was manufactured in full compliance with Standard 208 and in furtherance of the Secretary's policy to introduce passive restraints gradually.

If the District of Columbia attempted to enforce an ordinance requiring airbags in all 1987 model year passenger vehicles in the District, there is no question that such an action would be preempted by Section 1392(d) and

[5] The requirements of Standard 208 evolved over time, and eventually were replaced by a mandate requiring the installation of airbags. All passenger cars manufactured after September 1, 1997, must have "an inflatable restraint system at the driver's and right front passenger's position," which is the regulatory description of an airbag. 49 C.F.R. § 571.208, S4.1.5.3. For a time, Congress specifically prohibited NHTSA from requiring airbags to be installed without prior congressional review. *See* 15 U.S.C. § 1410b. Now that airbags are mandatory, this provision has been repealed. *See* Act of July 5, 1994, Pub. L. No. 103-272, § 7(b), 108 Stat. 745, 1379, 1385.

Standard 208. The analysis is straightforward. The "aspect of performance" is whether an automobile must include an occupant restraint system and, if so, whether it must be of a particular kind. This aspect of performance is expressly addressed by Standard 208, which for the year in question allowed manufacturers to choose among different restraint systems, including manual seat belts and airbags. The hypothesized ordinance, in contrast, would compel manufacturers to install airbags in all vehicles. Such a state standard clearly regulates the same "aspect of performance," but in a way that is plainly not "identical" to Standard 208. As a result, the ordinance or regulation would be preempted.

Note that the District of Columbia could not defend such an ordinance on the ground that, since Standard 208 is elective and the local ordinance compulsory, it is "not impossible" to comply with both. Cf. Pet. Br. 41-42. Nor could such an enactment be sustained on the ground that the federal standards should be construed as "minimum" standards that States are free to supplement with higher standards. Cf. *Id.* at 42-43. Section 1392(d) does not preempt only state standards that are "impossible" to meet consistent with the terms of the federal standard, nor does it preempt only those state standards that fall "below" the federal standard. It preempts *any* state standard that is "not identical" to the federal standard.

II. THE EXPRESS PREEMPTION OF "ANY SAFETY STANDARD" NOT IDENTICAL TO A FEDERAL STANDARD INCLUDES A SAFETY STANDARD IMPOSED BY STATE COMMON LAW.

Given that Section 1392(d) expressly preempts any state statute or regulation that would mandate the installation of airbags in cars during years when Standard 208 gave manufacturers the option to install airbags, the next question is whether a different result should apply if the state standard is adopted after-the-fact as a matter of state com-

mon law. Petitioners and their supporting *amici* advance a number of arguments in an effort to cabin the uniformity required by Section 1392(d) to the realm of positive regulation, leaving common-law standards free to proliferate. None of these arguments is persuasive in the context of the Safety Act.

A. "Any Safety Standard" Is Not Limited To Positive Regulations.

First, petitioners and their *amici* argue that the phrase "any safety standard" in Section 1392(d) should be interpreted restrictively to mean only "state legislative and administrative enactments." See Pet. Br. 18-25. This position—which would permit even a mandatory injunction based on a common-law standard—is wrong, for several mutually supporting reasons.

To begin with, the claim that "any safety standard" refers only to positive enactments is contrary to this Court's decisions construing other express preemption clauses. Those decisions hold that terms such as "requirement," "prohibition," and "standard" in a preemption provision do in fact encompass rules of decision established by common-law damages actions. See *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 520-24 (1992) (Stevens, J., plurality opinion); *id.* at 548-49 (Scalia, J., concurring and dissenting in part); *CSX Transp., Inc.* v. *Easterwood*, 407 U.S. 658, 664 (1993); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 503-05 (1996) (Breyer, J., concurring); *id.* at 510-12 (O'Connor, J., concurring and dissenting in part). The Court's repeated holdings on this interpretive point have been fully and deliberately considered and should be adhered to as a matter of *stare decisis*.

Indeed, if any distinction is to be drawn between *Cipollone*, *CSX*, and *Medtronic* and this case, it would favor a finding that Section 1392(d) is more easily construed as covering common-law standards of care. The word "requirement," which provided the focal point of the discussion in *Cipollone* and *Medtronic*, denotes an "order," "command," or "directive." *Random House Dictionary of the English Language* (Unabridged ed. 1966). The word "standard," in contrast, denotes a "rule or principle" that is "used as a basis for judgment." *Id.* Although the common law sometimes adopts precise requirements (as in the Rule Against Perpetuities), it more often employs general standards. See, *e.g.*, Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257, 261 (1974) (noting that "precise rules" are most commonly associated with legislative decisionmaking while "standards" are associated with judicial decisionmaking). Thus, if anything, an express preemption clause that refers to "any safety standard" is more naturally construed as covering common-law rules of decision than were the preemption clauses construed in *Cipollone* and *Medtronic*.[6]

The conclusion that "any safety standard" includes common-law duties of care is reinforced by the definitions of the Safety Act. The Act does not specifically define the phrase "any safety standard," which necessarily refers to a variety of possible state standards. But it does define "motor vehicle safety standards," which are the federal standards to which state "safety standards" must be identical. That definition requires, among other things, that a

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[6] The Court has indicated in a variety of contexts that the term "standards" refers to state common law as well as state positive law. *See, e.g., Atherton* v. *FDIC*, 519 U.S. 213, 217-26 (1997) (state common law may be taken as setting the "standard of conduct" and the "standard of care" that directors and officers owe to a federally chartered financial institution); *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California products liability law); *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 400 (1965) (referring to "common law standards"); *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 630-31 (1959) (referring to "standard[s] of care" imposed by common law).

motor vehicle safety standard must "meet the need for motor vehicle safety." [7]

The Safety Act goes on to define "motor vehicle safety" in a way that is highly significant in determining whether common-law tort rules are included in the meaning of "any safety standard." That definition provides as follows:

> "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against *unreasonable risk of accidents* occurring as a result of the design, construction or performance of motor vehicles and is also protected against *unreasonable risk of death or injury to persons* in the event accidents do occur, and includes nonoperational safety of such vehicles.

15 U.S.C. § 1391(1). The highlighted phrases in this definition—"unreasonable risk of accidents" and "unreasonable risk of death or injury"—are of course identical to the conventional formulation of the duty of care recognized in the common law of torts. See, *e.g.*, *Restatement (Second) of Torts* § 282 (1965) (defining negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm"); *id.* § 284 (defining negligent conduct as "an

[7] The full definition is as follows:

> "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

15 U.S.C. § 1391(2). Petitioners (at 23) and the Government (at 13) stress that this definition requires that federal standards provide "objective criteria," a characterization more appropriate for positive regulation than common law. But the relevant statutory term for preemption purposes is "any safety standard," not "motor vehicle safety standard." The best indication of what is covered by "any safety standard" is the definition of "motor vehicle safety," which demarcates the *content*, as opposed to the *form*, of the federal standards.

act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another"); *Restatement (Third) of Torts: Product Liability* § 2 (1997) (a product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe"). In other words, federal motor vehicle standards and the common law of torts are both grounded in the same general principle—the avoidance of unreasonable risks of accidents, death or injury.

It follows that federal motor vehicle safety standards and state common-law tort rules cover the same terrain, and have similar objectives. This of course heightens the potential that these two sources of law will develop non-identical standards with respect to the same aspect of performance. At the very least, the definition of motor vehicle safety establishes that it is nonsense to speak of motor vehicle safety standards and state tort law as being "entirely different," see Brief Amicus Curiae of Missouri *et al.*, at 14, and hence as presenting no potential for conflict.[8]

Finally, petitioners' argument that common-law judgments do not establish "standards" simply defies common

[8] Petitioners argue that common-law claims regulate *design* rather than *performance* and that performance alone is what the Safety Act regulates. *See* Pet. Br. 21-24. But this is clearly untrue. The Safety Act authorizes the Secretary to adopt standards. *See* 15 U.S.C. § 1392. The standards must "meet the need for motor vehicle safety," *id.*, which is defined as "the performance of motor vehicles or motor vehicle equipment" in a way that protects the public "against unreasonable risk of accidents occurring because of the *design*, construction or performance of motor vehicles." *Id.* § 1391(1) (emphasis added). The Safety Act thus authorizes the agency to regulate the design, construction, and performance of such equipment as a means of meeting the need for motor vehicle safety.

sense. This Court has long recognized that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959). Justice Breyer made the point in *Medtronic* by alluding to a hypothetical federal regulation requiring a 2-inch wire in a hearing aid component:

> If the federal law, embodied in the "2-inch" . . . regulation, preempts the state "1-inch" agency regulation, why would it not similarly preempt a state-law tort action that premises liability upon the defendant manufacturer's failure to use a 1-inch wire (say, an award by a jury persuaded by expert testimony that use of a more than 1-inch wire is negligent)? *The effects of the state agency regulation and the state tort suit are identical.*

Medtronic, 518 U.S. at 504 (Breyer, J., concurring in judgment) (emphasis added).

Petitioners' *amici* advance a variety of arguments in an effort to show that positive regulation and common-law liability are different. They are of course different in many respects. But none of the *amici* denies that common-law liability performs the important regulatory function of forcing defendants to internalize the social costs of their behavior.[9] Indeed, several of petitioners' *amici* celebrate

[9] The academic writings relied upon by petitioners' *amici* are in full agreement with the basic proposition that safety regulation and common law liability are alternative means to the same end. *See* Guido Calabresi, *The Costs of Accidents*, 68-129 (1970) (discussing safety regulation (which he calls "specific deterrence") and tort liability (which he calls "general deterrence") as alternative means of reducing the sum of accident costs and accident prevention costs); Stephen Breyer, *Regulation and Its Reform*, 177 (1982) (noting that tort liability rules are, "in some instances, a possible substitute for (or supplement to) a classical system of regulation"); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Stud. 357, 374 (1984) (noting that "the injunction and safety regulation may be viewed as substitutes, but not perfect ones, and similarly with the fine and liability"); Mary L. Lyndon, *Tort Law and Technology*, 12 Yale J. on Reg. 137, 143 (1995) (tort law and safety regulation "can best be thought of as branches of health and safety law, which provide different procedural options or formats for addressing the social costs of technical change").

this feature of the common law, and argue that it creates more powerful incentives for safety than do federal safety standards. See, *e.g.*, Brief Amicus Curiae of The Association of Trial Lawyers of America, at 11-12; Brief Amicus Curiae of Robert E. Leflar, *et al.*, at 17-19. Petitioners' *amici* are of course free to espouse the superiority of common-law liability as a mode of safety regulation. But they cannot at the same time take the position that the standards on which such liability is premised are not "safety standards." That, of course, is the only relevant question to be answered in determining whether common-law standards of care come within the terms of Section 1392(d).

B. Common-Law Standards Are "Established" Or "Continued In Effect" By A "State."

Petitioners (Br. 23) and the Government (Br. 13) further argue that Congress was concerned only with positive laws and regulations because it chose to describe the preempted safety standards as ones that are "establish[ed]" or "continue[d] in effect" by a "State or political subdivision of a State." This language, they suggest, is more apposite to standards adopted by legislative or regulatory bodies than to the rules of decision adopted and applied by courts.

Petitioners and the Government may be right that this language is not what one would most naturally select if one were drafting a preemption clause to apply *only* to judicial standards. But Congress was writing broadly, and wanted to cover nonidentical standards from all sources of state and local authority, including, for example, counties and municipal governments. Naturally, it had to

choose language that is not precisely tailored to courts. Once again, however, careful attention to the exact words Congress used rebuts any notion that Section 1392(d) does not apply to standards adopted by courts.

Consider, first, the use of the word "establish" to refer to the prohibited safety standards. Although petitioners and the government claim this word is not ordinarily used to describe common-law rules of decision, this is in fact untrue. This Court, for example, has referred to "common-law rules *established* by the different States" precisely in the context of discussing the scope of preemption of state standards. *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 496 (1987) (emphasis added). In any event, even if there were something anomalous in speaking about common-law rules being "established," the statute speaks in the alternative: States are forbidden "to establish, *or to continue in effect*" nonidentical safety standards. There is nothing anomalous about speaking of States "continuing in effect" common-law standards. Indeed, in virtually every State, the courts' ultimate authority to apply common-law standards in resolving disputes rests on legislation that "continues" the common law of England. See Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 Vand. L. Rev. 791, 798-800 (1951).

Nor is there anything unusual in referring to common-law standards as being established or continued in effect by a "State." In *Medtronic*, for example, the statute at issue contained the same phrase—" 'State or a political subdivision' " found in Section 1392(d). *Medtronic*, 518 U.S. at 481. Yet a majority of the Court held that the preemption clause in that case reached common-law claims. *Id.* at 503-05 (Breyer, J., concurring); *id.* at 509-10 (O'Connor, J., concurring and dissenting in part).

Moreover, this Court has concluded in a variety of contexts that common-law judgments rendered by state

courts are a form of state action. See, *e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 n. 17 (1996) ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964) ("It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute."); *Shelley* v. *Kraemer*, 334 U.S. 1, 19-20 (1948) (judicial enforcement of racially restrictive covenant is state action). It is hard to imagine a plausible argument that would reach the opposite conclusion. Not only are parties expected to comply with the judgments of courts as a matter of direct legal obligation, see, *e.g.*, *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958), their failure to comply with a judgment, even if only one for the payment of damages, can bring down upon them the coercive powers of the State in the form of execution against their property or garnishment of their wages.

Petitioner's argument that Congress differentiated between the standards adopted by courts and standards adopted by the "State" is also at odds with *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). *Erie* of course held that the "laws of the several states," as that phrase is used in the Rules of Decision Act, 28 U.S.C. § 1652, includes common-law rules of decision. The *Erie* doctrine reflects an important background principle of law, and it is unlikely that Congress legislated based on a different understanding. See *Cipollone*, 505 U.S. at 522-23; see also *id.* at 549 (Scalia, J., concurring and dissenting in part). Accordingly, for all these reasons, Congress could not have meant to exclude common-law standards and rules when it extended the prohibition in Section 1392(d) to all safety standards "estabilsh[ed] or . . . continue[d] in effect" by a "State."

C. Construing "Any State Standard" To Include Common-Law Standards Does Not Preempt "Virtually All" Common-Law Claims.

In a last-ditch effort to avoid the conclusion that Section 1392(d) includes common-law claims, petitioners argue that the preemption clause must be limited to positive regulation to avoid preempting "virtually *all* common law claims involving aspects of motor vehicle performance." Pet. Br. 24-25. In fact, reading the preemption clause to include common-law standards would delineate only a narrow scope of preemption: it would proscribe only those common-law claims that adopt a safety standard with respect to "the *same* aspect of performance" addressed by a federal standard, and even then only insofar as the common-law standard is "*not identical* to the Federal standard."

In the context of restraint systems, for example, the Safety Act leaves the States free to enforce any standard of care with regard to an aspect of vehicle safety that does *not* involve "the same aspect of performance" covered by a federal safety standard. Thus, Section 1392(d) and Standard 208 do not preempt common-law claims that the particular occupant restraint system selected by the manufacturer, such as an airbag, was improperly designed or was improperly manufactured. See, *e.g.*, *Perry* v. *Mercedes Benz of N. Am., Inc.*, 957 F.2d 1257, 1265-66 (5th Cir. 1992) (manufacturer that installs airbag may be liable for defect in design or manufacture). For purposes of this case, only the claim that a manufacturer installed one rather than another of the authorized occupant restraint systems (*e.g.*, a "no-airbag" claim) is expressly preempted.

In addition, under the second clause of Section 1392(d), the States could enforce the "identical" standard embodied in Standard 208 by allowing tort suits against any manufacturer that did not install any of the occupant

restraint systems required by federal law during the relevant period. Thus, now that airbags are required for the driver and right front seating positions in all new vehicles, state "no-airbag" claims no longer are preempted with respect to such equipment in new vehicles because they would impose the identical standard of care as is embodied in the current version of Standard 208. See 49 C.F.R. § 571.208, S4.1.5.3 (1998). The scope of express preemption is thus quite measured and sensible as a matter of federal-state regulatory policy.

III. SECTION 1397(k) DOES NOT LIMIT OR QUALIFY THE PREEMPTIVE FORCE OF SECTION 1392(d).

Petitioners and the Government also seek refuge in what some have called the Safety Act's "savings" clause, which states that "[c]ompliance with any Federal motor vehicle safety standard issued under this title does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). They contend that this provision overrides, limits, or qualifies the express preemption mandated by Section 1392(d), so that common-law claims are placed entirely beyond the reach of Section 1392(d). See Pet. Br. 25-28; U.S. Br. 13-15. This interpretation, however, does not square with the Act's text (including the language of Section 1397(k) itself), or with its structure and context. Indeed, such an interpretation would destroy the very uniformity of federal standards that the Act was designed to create, in violation of the important canon that savings provisions should not be construed so that the Act "destroy[s] itself." *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 445 (1907). Sections 1392(d) and 1397(k) can and should be harmonized so that some common-law claims—those that defeat the uniformity of federal standards—are preempted, whereas other types of common-law claims are preserved.

A. The Language Of Section 1397(k) Does Not Limit Or Qualify The Scope Of Section 1392(d).

Section 1397(k) does not by its terms limit or qualify the scope of express preemption mandated by the preemption clause in Section 1392(d). In fact, when read closely and in accordance with their plain meaning, the two provi sions are not, as the Government assumes (Br. 15), even in "tension" with each other.

Section 1397(k) speaks of an "exemption" from "common-law liability." A defendant who properly invokes Section 1392(d) has no need for an "exemption" because he is not subject to a duty the breach of which could ever give rise to any liability. As one court of appeals recently held in rejecting the very interpretation advanced by petitioners here, "[t]o be 'exempted' from liability [under Section 1397(k)], one must first be subject to it." *Harris* v. *Ford Motor Co.*, 110 F.3d 1410, 1415 (9th Cir. 1997).

It is axiomatic that "common-law liability" in tort can arise only for breach of a duty or standard. See, *e.g.*, *Restatement (Second) of Torts*, § 4(c) (1965). By depriving the States of "any authority either to establish, or to continue in effect, . . . any safety standard" that is not identical to the federal standard, Section 1392(d) deprives the States of authority to create any such duties or standards with respect to the same "aspect of performance." Indeed, any attempt to impose such a duty or standard would be "void" and "without effect." *Maryland* v. *Louisiana*, 451 U.S. 725, 746, 747 (1981). Thus, no liability for the breach of such a standard or duty could ever arise in the first place, and Section 1397(k) simply would not apply in that situation.

This conclusion is confirmed by the fact that Section 1397(k) is expressly triggered by a manufacturer's "compliance" with a federal safety standard. A defendant who

properly invokes 1392(d) does not need to be in compliance with the federal standards for that provision to preempt a non-identical state standard. By its terms, that provision preempts a non-identical state safety standard of its own force, regardless of the manufacturer's actions. This too suggests that Section 1397(k) cannot reasonably be construed as blocking, limiting, or qualifying the ordinary operation of Section 1392(d). If Section 1397(k) had been intended to have that effect, Congress simply would not have chosen the language it did.

B. Sections 1392(d) And 1397(k) Play Complementary Roles In Determining Which Common-Law Claims Can Be Maintained.

Petitioners, joined by the Government, nevertheless contend that unless all common-law standards are excluded from preemption under Section 1392(d), "there would be no meaningful role for Section 1397(k)." U.S. Br. 14. This is incorrect. When one carefully examines the Act's structure and makes a good-faith effort to construe both provisions in tandem, it is apparent that both Section 1392(d) and Section 1397(k) can each apply to common-law actions, depending on the relationship of the particular common-law claim to existing motor vehicle safety standards. See, *e.g.*, *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) (in interpreting an express preemption provision, "[e]vidence of pre-emptive purpose is sought in the text and structure of the statute"); *Smith* v. *United States*, 508 U.S. 223, 233 (1993) (provisions should be construed in tandem, not in isolation). Indeed, Section 1397(k) plays an important role in the statutory scheme, albeit one quite different from that urged by petitioners and the Government. This is seen from an examination of the four scenarios in which preemption of common-law claims might be an issue.

1. The first is the situation presented by this case, *i.e.*, where the proposed state safety standard applies to the

same "aspect of performance" as the federal standard, but is not identical to it. As explained above, Section 1397(k) does not, by its terms, apply in this situation, because Section 1392(d) prevents the creation or retention of a non-identical "safety standard"—common-law or otherwise—on which liability could be based.

2. The second scenario is one in which a state safety standard applies to the same aspect of performance, but is identical to it. Section 1397(k) has no role to play in this scenario either because, as discussed above, the second sentence of Section 1392(d) expressly allows states to "enforce[] any safety standard which is identical to a Federal safety standard."

3. Section 1397(k), however, does play an important role in the third scenario, one in which a state tort-law standard allegedly governs an "aspect of performance" that is *not* directly covered by a federal standard. That would be the case, for example, if a plaintiff claimed that a manufacturer, although installing an airbag in compliance with Standard 208, nevertheless violated state tort law by using a defective design. *E.g.*, *Perry*, 957 F.2d at 1265.

Absent Section 1397(k), as Honda, the Government, and several other *amici* discuss at length, manufacturers in these circumstances might have argued that the Safety Act impliedly creates a federal-law "government standards" defense which shields them from tort liability as long as they complied with all applicable standards. Section 1397(k) makes clear that the Act does not create such a defense or "exemption from liability," and therefore does not preempt state-law rules foreclosing or refusing to recognize such a defense. Thus, whenever there is no federal standard with respect to the specific "aspect of performance" at issue, it is up to the States to determine what effect, if any, a manufacturer's compliance with any or all of the extant federal standards have on its liability.

This reading of Section 1397(k) is consistent not only with the statute's language and structure, but also with the relevant legislative history.[10] This reading is also strengthened by the fact that in 1966, when the Safety Act was passed, the States differed—and still differ—in their views regarding such an affirmative defense and the admissibility of evidence of compliance with federal standards.[11]

In addition, without Section 1397(k), manufacturers could have argued that the Act should be construed to occupy the entire field of motor vehicle safety standards.[12]

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[10] For example, one of the conferees, Senator Cotton stated:

> The Senate conferees also yielded on a provision, inserted by the House, declaring that compliance with any Federal standard does not exempt any person from liability under common law. Nevertheless, it seems clear and was, I believe, the consensus of the conferees on both sides, that proof of compliance with Federal standards may be offered in any proceeding for such relevance and weight as courts and juries may give it.

112 Cong. Rec. 21,490 (1966); *accord id.* at 21,487 (remarks of Senator Magnuson, quoted in Pet. Br. 31-32). That is exactly what Section 1397(k) did. It ensured that the fear of a broad "government standards" defense expressed by some congressional witnesses would not materialize, and that states would therefore have flexibility to decide whether and to what extent a party's compliance with federal standards exempts a manufacturer from being subject to "any liability" under state tort law.

[11] Some States recognize a rebuttable presumption that a product which complies with federal standards is not defective. *E.g.*, Mich. Comp. Laws Ann. § 600.2946(4) (West 1999); Kan. Stat. Ann. § 60-3304(a) (1999). Others hold compliance with federal standards is relevant to whether there is a defect, but not conclusive, *e.g.*, *Wagner* v. *Clark Equip. Co.*, 700 A.2d 38, 49-50 (Conn. 1997); *Brooks* v. *Beech Aircraft Corp.*, 902 P.2d 54, 63 (N.M. 1995), while some States hold generally that compliance conclusively negates any defect, *see, e.g.*, *Beatty* v. *Trailmaster Prods.*, 625 A.2d 1005, 1013-14 (Md. 1993).

[12] As the Government points out (Br. 14 n.11), the second sentence of Section 1392(d) makes clear that Congress did not attempt to occupy the field of safety-standard *enforcement*, inasmuch as the provision expressly allows the States to enforce federal standards. But that section does not expressly authorize the States to establish

Such an argument would have been highly plausible in 1966. At that time, it had been only ten years since this Court, in *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956), held that a congressional act was deemed to occupy a particular field when—as is also true of the Safety Act—the statute created a pervasive federal regulatory scheme, was based on a perceived need for national uniformity, and there existed a danger of conflict between state laws and the administration of the federal program. *Id.* at 502, 504-05. And it had only been seven years since this Court had held, in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), that the National Labor Relations Act ("NLRA") completely occupied the field of labor-management relations, so as to preclude a state-law tort action for damages occasioned by union picketing—even where no provision of the NLRA dealt with that issue. *Id.* at 241-43, 245.[13]

In the wake of *Nelson* and *Garmon*, it would only have been prudent for Congress to insert a provision making clear that the Safety Act did not completely occupy the field of motor vehicle safety standards, and therefore that common-law actions would be permitted to enforce state standards dealing with "aspects of performance" not covered by a federal standard, even if the manufacturer was otherwise complying fully with all federal standards. See *Gracia* v. *Volvo Europa Truck, N.V.*, 112 F.3d 291,

state-law standards that are not identical to an applicable federal standard, and therefore does not by itself foreclose the field occupation argument discussed in the text.

[13] Even today, the argument would have force given that NHTSA has promulgated comprehensive regulations governing motor vehicle safety. *See* 49 C.F.R. §§ 571.101-.500 (1998). "Where a multiplicity of federal . . . regulations govern and densely criss-cross a given field, the pervasiveness of such federal laws will help to sustain a conclusion that Congress intended to exercise exclusive control over the subject matter." Laurence H. Tribe, *American Constitutional Law* § 6-31, at 1206-07 (3d ed. 1999).

298 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 697 (1998). That, among other things, is exactly what it did in Section 1397(k).

4. Section 1397(k) would also play an important role in a fourth scenario as well. That is where a federal safety standard is in effect with regard to a particular aspect of performance or "item of equipment" within the meaning of Section 1392(d), but the plaintiff claims that the manufacturer's actions with respect to that aspect or item violate a body of common law that is unrelated to safety—specifically, contract law.

For example, suppose that, during the time Standard 203 allowed manufacturers the option of installing airbags or other occupant restraint devices, a manufacturer signed a contract to provide to a rental company a fleet of vehicles equipped with airbags. In a breach-of-contract action seeking to enforce that promise, Section 1397(k) makes clear that the manufacturer could not invoke its compliance with federal safety standards to block the claim. Cf. *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228-33 (1995) (express preemption clause did not protect airline from "alleged breach of its own, self-imposed undertakings").

In other words, Section 1397(k) makes clear that state common-law actions can be maintained to enforce the manufacturer's own commercial contracts, even if the standard the manufacturer agrees to by contract is not one the State could otherwise impose consistent with Section 1392(d), and even if the manufacturer is complying with the applicable federal standard. This view of Section 1397(k) likewise finds support in the legislative history.[14]

[14] It is, for example, consistent with Representative Dingell's statement during the floor debates that in the Safety Act, "we have preserved every single common-law remedy that exists against a manufacturer for the benefit of a motor vehicle purchaser. This means that all of the warranties and all of the other devices of

In short, properly construed, Section 1392(d) and Section 1397(k) each play important roles in determining which common-law claims may go forward, and in what circumstances. In contrast, petitioners' sweeping interpretation of Section 1397(k) deprives Section 1392(d) of any meaning in the context of common-law standards. Such a result would be contrary not only to the language and structure of the Act, but also to its legislative history, which clearly indicates an awareness that Section 1392(d) would sometimes preempt common-law tort actions notwithstanding Section 1397(k).[15]

C. Section 1397(k) Should Not Be Interpreted To Destroy The Uniformity Of Safety Standards.

This reading of the interplay between Sections 1392(d) and 1397(k) is also most consistent with the underlying purposes of the Safety Act. As explained above (*supra* at 7-8), Congress wanted not only to promote safety, but

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common law which are afforded to the purchaser, remain in the buyer, and they can be exercised against the manufacturer." 112 Cong. Rec. 19,663 (1996) (quoted in Pet. Br. 30-31). As explained above, Sections 1392(d) and 1397(k) can easily be read as preserving all common-law "remedies" and "devices," including commercial contract actions. The statements from the House Committee Report, cited by the petitioners (Br. 30), and the statement by Senator Magnuson, cited by the petitioners (*id.* at 28-29), are likewise consistent with this reading.

[15] Referring to Section 1397(k), Senator Magnuson noted to his Senate colleagues that it simply "makes explicit, in the bill, a principle developed in the Senate report." 112 Cong. Rec. 21,487 (1966). But the "principle developed in the Senate report" to which Senator Magnuson referred is that federal safety standards "*need not* be interpreted as restricting State common law standards of care," and that "[c]ompliance with such standards would thus *not necessarily* shield any person from product liability at common law." S. Rep. No. 89-1301, at 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (emphasis added). By negative implication, these statements clearly evince an understanding that, in some circumstances, the Safety Act would restrict the range of permissible common-law product liability actions.

also to preserve a single market for the production and distribution of automobiles. Petitioners' extreme reading of Section 1397(k), however, would destroy the uniformity that Congress sought to create. Petitioners' interpretation therefore runs headlong into the fundamental axiom of statutory construction that so-called "savings clauses" should not be interpreted so as to destroy the fundamental policies of the statute in which they appear.

The principle was first stated almost a century ago in *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907). There, a federal act contained a broad savings clause that purported to save "the remedies now existing at common law or by statute." *Id.* In spite of that savings clause, the Court held that an existing but conflicting common-law claim was preempted because a savings clause "cannot in reason be construed as continuing . . . a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself." *Id.*

The *Abilene Cotton* holding is a settled principle of statutory construction that has been consistently applied in a variety of contexts. Thus, where necessary, the Court has given savings clauses an appropriately narrow reading so as not to impair the preemptive thrust of the statute as a whole.[16]

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[16] *See, e.g., AT&T Co.* v. *Central Office Tel., Inc.*, 118 S. Ct. 1956, 1965 (1998) (savings clause "preserves only those rights that are not inconsistent with" the statute's requirements); *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 222 (1995) (state fraud suit expressly preempted notwithstanding savings clause providing that statute does not "'abridge or alter the remedies now existing at common law or by statute'"); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 485-97 (1987) (state common-law claims impliedly preempted because they conflicted with the method chosen by federal law to implement the statutory goals, despite broad savings clause); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51-52 (1987) (savings

Moreover, the *Abilene Cotton* canon is not limited to cases involving implied preemption claims. In *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), for example, the Court implicitly recognized this principle when it held that a "general 'remedies' saving clause cannot be allowed to supersede the specific substantive preemption provision." *Id.* at 385.

Indeed, if a saving provision generally cannot be construed to negate a conclusion of implied preemption, *a fortiori* a savings provision ought not be construed to negate an express preemption clause. A statute should not be held "to destroy itself," *Abilene Cotton*, 204 U.S. at 446, whether that destruction occurs because of a conflict with an implied feature of the federal scheme, or, as here, because of a conflict with an express congressional command that federal and state safety standards must be uniform whenever they govern the same aspect of performance.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondents' brief, the decision below should be affirmed.

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clause given narrow reading after the Court looked "to the provisions of the whole law, and to its object and policy") (internal quotation marks omitted); *Chicago & Northwest Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 328-31 (1981) (same).

Respectfully submitted,

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In the Supreme Court of the United States

ALEXIS GEIER, WILLIAM GEIER,
AND CLAIRE GEIER,

Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC.,
HONDA OF AMERICA MANUFACTURING, INC., AND
HONDA MOTOR COMPANY, LTD.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether petitioners' common law claim that respondents' 1987 Honda Accord was defectively designed because it was not equipped with an airbag is impliedly preempted by the National Traffic and Motor Vehicle Safety Act and Federal Motor Vehicle Safety Standard 208.

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INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation with 124 corporate members representing a broad cross-section of American industry. A list of the corporate membership of PLAC is attached as an appendix to this brief. PLAC's primary purpose is to file briefs as *amicus curiae* in cases raising issues that affect the development of product liability law.

PLAC's corporate members include manufacturers and distributors whose products are regulated by the National Traffic and Motor Vehicle Safety Act ("Safety Act") and the Federal Motor Vehicle Safety Standards ("FMVSS's") issued by the United States Department of Transportation ("DOT"). Accordingly, PLAC has a strong interest in assisting the Court in defining the scope of federal preemption under the Safety Act and FMVSS 208. PLAC has filed *amicus* briefs in numerous other cases in this Court involving preemption under a variety of federal statutes, including the Safety Act. See, *e.g.*, *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992).[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners contend that the 1987 Honda Accord was defectively designed by respondents (collectively "Honda") because the automobile did not have a driver-side airbag.[2] Petitioners brought a common law product liability action seeking to impose potentially massive liability on Honda based on this contention. But both the district court and the court of appeals dismissed their action as preempted by federal law.

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[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 37.3. In compliance with Rule 37.6, PLAC states that this brief was not written in whole or in part by counsel for a party, and no person or entity, other than PLAC or its members, made a monetary contribution to the preparation or submission of this brief.

[2] Petitioners assert only a "no airbag" claim; it is their exclusive claim of defect (see, *e.g.*, Pet. Br. 44 (petitioners "attempt to hold Honda liable for failing to install an airbag")). They do not contend that any aspect of the occupant restraint system in the 1987 Accord was defective.

Like every other federal court of appeals to consider the issue,[3] the D.C. Circuit held that petitioners' common law "no airbag" claim was preempted by the Safety Act, 15 U.S.C. §§ 1381-1431 (recodified at 49 U.S.C. §§ 30101-30169),[4] and FMVSS 208, 49 C.F.R. § 571.208. In reaching this conclusion, the court of appeals relied on the lengthy and "tortured" history of FMVSS 208, the occupant restraint standard, which showed that in 1984 the Secretary of Transportation had "explicitly rejected requiring airbags in all cars on the ground that a more flexible approach would better serve public safety" (Pet. App. 14). The court reasoned (*id.* at 15):

> [A]llowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department's policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems.

In attacking the D.C. Circuit's holding, petitioners and their *amici* ask this Court to turn federal preemption law on its head. They begin with a diversion, arguing that their common law "no airbag" claim is not *expressly* preempted by the Safety Act. Of course, the court of appeals affirmatively declined to resolve this issue and based its holding exclusively on an *implied* preemption analysis (Pet. App. 12). It is a telling sign of the weakness of petitioners' implied preemption argument that they devote so much attention (see Pet. Br. 14, 18-34) to an issue that was not decided below.

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[3] See *Montag* v. *Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990); *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). The Ninth Circuit in *Harris* v. *Ford Motor Co.*, 110 F.3d 1410 (1997), held that "no airbag" claims are expressly preempted by the Safety Act, without reaching the question of implied preemption. Thus, the six federal courts of appeals that have addressed the issue have all held that "no airbag" claims are preempted.

[4] For ease of reference, we cite to the prior codification of the Safety Act, which was cited by the courts below and by petitioners and their *amici*.

When they ultimately reach the implied preemption question, petitioners seek to radically transform federal preemption law. They first assert that there can be no implied conflict preemption under the Safety Act. But this Court rejected that very argument in *Myrick*, 514 U.S. at 285, a case in which the Court engaged in implied preemption analysis under the Act.

Petitioners finally contend, in the face of the Supremacy Clause, U.S. Const. art. VI, cl. 2, and this Court's longstanding precedents, that they should be allowed to proceed with their state law claim that the 1987 Honda Accord was defective because it lacked an airbag — even though the automobile's occupant restraint system (which consisted of lap and shoulder belts, and a warning system to indicate an unfastened belt (Pet. 3; Pet. App. 14)) fully satisfied FMVSS 208 and advanced the government's policy of promoting a variety of occupant protection devices in 1987-model-year automobiles.

Petitioners' common law theory of liability would severely impair a safety program that the federal government developed with unprecedented thoroughness over a period of 30 years. During much of that time, and in particular when the 1987 Accord was manufactured, Congress and DOT concluded that automotive safety would be *undermined* by depriving manufacturers of design flexibility in occupant restraint systems. Thus, as the government has acknowledged in this case (U.S. Br. 23-24), federal law expressly gave Honda the *option* to install lap and shoulder belts rather than airbags in the 1987 Accord.

Despite the lengthy and carefully nuanced regulatory history of FMVSS 208, petitioners claim that the States are free to come to the opposite conclusion: that automotive safety would have been better served by (and Honda was under) a *mandatory duty*, enforced by compensatory and punitive damages, to equip its 1987 Accord with airbags.

Our submission is simple and to the contrary: the federal government's resolution of the complex question whether, when, and how to require airbags in America's automobiles may not be set aside by state judges and juries who reach the conclusion that the federal policy was inadequate or wrongheaded. As the Solicitor General has explained (U.S. Br. 15-29), state law is not free, under

the Supremacy Clause, to impose requirements that conflict with and subvert this carefully calibrated federal program of occupant restraint regulation.

ARGUMENT

FEDERAL LAW IMPLIEDLY PREEMPTS A COMMON LAW REQUIREMENT THAT 1987-MODEL-YEAR AUTOMOBILES BE EQUIPPED WITH AN AIRBAG

I. FMVSS 208 REFLECTS THE JUDGMENT THAT SAFETY WOULD BEST BE ACHIEVED BY GIVING MANUFACTURERS A CHOICE IN THE SELECTION OF OCCUPANT RESTRAINT SYSTEMS

The lengthy history of the Safety Act and FMVSS 208 demonstrates conclusively that a common law claim requiring the installation of airbags is impliedly preempted because it would frustrate the policy underlying a safety standard adopted after laborious study over decades by an expert federal agency.

A. The Safety Act

1. Federal Motor Vehicle Safety Standards

Congress enacted the Safety Act in 1966 to protect the public "against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident." 15 U.S.C. § 1391(1). Congress sought to accomplish this goal by authorizing the Secretary of Transportation to prescribe safety standards of nationwide applicability. Congress declared that such standards must "meet the need for motor vehicle safety" and be "reasonable" and "practicable" in their operation. 15 U.S.C. §§ 1392(a), 1392(f)(3). The Secretary is required under the statute to consider "public acceptance or rejection" of a proposed standard. *Pacific Legal Found.* v. *DOT*, 593 F.2d 1338, 1344 (D.C. Cir. 1979).

Although public safety is the "paramount purpose" of the Act, Congress also directed the Secretary to give careful "consideration [to] all relevant factors, including technological ability to achieve the goal of a particular standard as well as consideration of economic factors." H.R. Rep. No. 89-1776, at 16-18 (1966). The

"tests of reasonableness of cost, feasibility and adequate lead time should be included among those factors which the Secretary should consider in making his total judgment." S. Rep. No. 89-1301, at 6-7 (1966). Congress specifically directed the Secretary to prescribe feasible timetables for implementing new safety standards "because it may be a practical economic and engineering impossibility, as well as a source of great hardship and unnecessary additional cost, to require that all vehicle changes required by any new safety standard" be accomplished immediately. *Id.* at 7.

2. Federal Preemption and the Need for Uniform National Standards

Congress intended the safety standards promulgated under the Act to be "uniform national standards." *Wood* v. *General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988). It achieved that objective, in part, by preempting state law in the following express terms (15 U.S.C. § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

In explaining the need to preempt state law, the Senate Report on the Act emphasized that "[t]he centralized, mass production, high volume character of the motor vehicle manufacturing industry in the United States requires that motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country." S. Rep. No. 89-1301, *supra*, at 12. Accordingly, "State standards are preempted" to the extent "they differ from Federal standards" because "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." *Id.* at 4, 12.

The House Report elaborated that "this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by

a multiplicity of diverse standards." H.R. Rep. No. 89-1776, *supra*, at 17. As President Johnson noted: "The only alternative is unthinkable — 50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14,253 (1966).

In hearings on the Act, legislators and witnesses repeatedly stressed that uniform national standards were necessary for three reasons. *First*, the national scope of the issue of vehicle safety compelled a national response. When Secretary of Commerce John Connor was asked about the authority granted to the Secretary of Transportation under the Act, he responded:

> We think that the highway safety problem is a matter of great public concern, and national interest. We don't think that the objectives that have been defined can be accomplished on a piecemeal basis or by leaving the authority untouched that is now vested in the States and municipalities.

Traffic Safety: Hearings on H.R. 13228 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess., pt. 1, at 146 (1966) (hereafter *"House Hearings"*).

Second, uniform national standards were needed because multiple and inconsistent state standards would "creat[e] chaos in the automotive industry." *House Hearings*, *supra*, at 606 (statement of Rep. Hathaway). Senator Abraham Ribicoff testified that "if there is any item in American life that we use in our society that has to have some national standards because of the very nature of the item, it is the automobile." *Id.* at 574.

Third, uniform national standards were required because the States were unable to develop appropriate safety standards. As Senator Ribicoff observed, "[i]n simple language, we are forced to establish a Federal role in highway traffic safety because State and local authorities have been unable to do the whole job * * *. It's time that the ultimate authority of the Federal Government was exercised in the traffic safety field." *House Hearings*, *supra*, at 554, 559, 561.

3. The "Savings" Clause

Another issue that arose in the hearings on the Safety Act was whether the Act's preemption provision was intended to occupy the

field and preclude all state laws relating to motor vehicle safety. The sponsors made it clear that preemption would apply only in areas where DOT chose to act. See, *e.g.*, *Traffic Safety: Hearing on S. 3005 Before the Senate Comm. on Commerce*, 89th Cong., 2d Sess. 65-66 (1966).

To avoid confusion, Congress clarified that it was not occupying the field of motor vehicle safety and that the Safety Act did not establish compliance with federal safety standards as an affirmative defense in common law actions. Section 1397(k) of the Act states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."

This provision is sometimes referred to as the Act's "savings" clause. See Pet. App. 4. But Section 1397(k) lacks the indicia of a true savings clause. Indeed, the text, structure, and legislative history of the Safety Act show the narrow scope of this section and its inapplicability to federal preemption. *First*, Section 1397(k) was not made part of the Safety Act's preemption provision, but instead was located five sections later.[5] *Second*, while the title of the preemption provision (Section 1392(d)) is "Supremacy of federal standards," the title of Section 1397(k) is "Continuation of common law liability" and makes no reference to preemption or federal supremacy.

Third, the sections on "Preemption" in the congressional reports make no mention of Section 1397(k), discussing only Section 1392(d). See H.R. Conf. Rep. No. 89-1919, at 16 (1966); H.R. Rep. No. 89-1776, *supra*, at 17. The Conference Report does not mention Section 1397(k) at all, and the discussion of that provision in the House Report is under the heading "Prohibited

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[5] When Congress recodified the Safety Act in 1994, both Section 1392(d) and Section 1397(k) were placed in a new section, 49 U.S.C. § 30103, entitled "Relationship to other laws." Section 1392(d), however, was placed in 49 U.S.C. § 30103(b), labeled "Preemption," whereas Section 1397(k) was placed in an entirely different subsection, 49 U.S.C. § 30103(e), whose title ("Common law liability") makes no reference to the Supremacy Clause or federal preemption. See Pub. L. No. 103-272, § 1(e), 108 Stat. 943 (1993).

Acts and Exemptions." See H.R. Rep. No. 89-1776, *supra*, at 22. *Fourth*, the floor debates on this section concerned evidentiary issues exclusively, and made no reference to preemption. See 112 Cong. Rec. 21,487-21,490 (1966).

B. The Early History Of FMVSS 208

Under the broad mandate of the Safety Act, DOT in 1967 promulgated FMVSS 208, which required the installation of manual seat belts in all new cars. 32 Fed. Reg. 2415 (1967). "[T]he safety benefits of wearing seat belts are not in doubt." *MVMA* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). Motor vehicle occupants often failed to use their seat belts, however, thus prompting DOT to consider the feasibility of so-called "passive" or "automatic" restraint systems — including airbags. Between 1969 and 1976, the federal government conducted over 2,000 tests of such devices to evaluate their utility. *Pacific Legal Found.*, 593 at 1344.

In its examination of passive restraint systems, DOT repeatedly expressed its intent "to allow the maximum degree of manufacturer initiative in developing crash protection systems" (35 Fed. Reg. 7187, 7188 (1970)) and specifically rejected a mandatory airbag rule (*id.* at 16,927-16,928). DOT also acknowledged the need for a gradual, phased-in schedule for *any* future passive restraint requirement in light "of the extreme dislocations, and the attendant financial hardships, that would be caused by requiring the world industry * * * to introduce major new systems in substantially all their passenger cars." 36 Fed. Reg. 19,255 (1971).

During this formative stage of the federal regulatory program, DOT proposed a requirement that manufacturers install a passive restraint system selected in their discretion, but later postponed that requirement until the 1976 model year. 37 Fed. Reg. 3911 (1972). In the interim, DOT continued to grant manufacturers the option to install manual "lap and shoulder belts coupled with an 'ignition interlock' that would prevent starting the vehicle if the belts were not connected" — an option that nearly all manufacturers exercised. *State Farm*, 463 U.S. at 35-36. One year later, DOT suspended its passive restraint proposal because of the need for further administrative study. 38 Fed. Reg. 16,072, 16,073 (1973).

Responding to a wave of protests from consumers, Congress intervened in 1974 to supervise the future development of FMVSS 208 and rejected DOT's "ignition interlock" requirement. 15 U.S.C. § 1410b(1). At the same time, Congress declared its strong preference for traditional seat belt safety systems and provided that a non-belt safety system would be permissible only if FMVSS 208 gave manufacturers the *option* to install a seat belt system instead. 15 U.S.C. § 1410b(2)-(3). Congress prohibited DOT from mandating airbags or any other non-belt safety systems unless it complied with special hearing procedures and awaited the results of a review by both Houses of Congress. 15 U.S.C. § 1410b(b)-(f). This provision reflected Congress' opposition to inadequately considered proposals mandating passive restraints (such as airbags) and Congress' belief that it "should not require of the automobile industry and the purchasing public anything more" than the familiar "seat belt and shoulder harness" restraint system. 120 Cong. Rec. 27,815-27,816, 27,822-27,823 (1974).[6]

Following this declaration of policy by Congress, DOT renewed its study of passive restraint systems, including airbags, but continued to grant manufacturers the "option" to install manual seat belts instead of passive restraints. 40 Fed. Reg. 16,217, 16,218 (1975). Growing concern over the effectiveness and public acceptability of passive restraint devices prompted Secretary of Transportation William Coleman to defer (41 Fed. Reg. 36,494 (1976)) and ultimately to rescind (42 Fed. Reg. 5071 (1977)) a proposed passive restraint requirement, thereby continuing in effect the manual "lap and shoulder seat belt option" that had been utilized by "the vast majority of manufacturers" (41 Fed. Reg. 24,070 (1976); *id.* at 36,494; 42 Fed. Reg. 5071 (1977)). Secretary Coleman explained the policy objections to a mandatory passive restraint requirement (41 Fed. Reg. at 24,071):

> These passive restraint-equipped vehicles will cost more, but, in tests to date, have been found to provide no materially

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[6] This legislation "shows that Congress intended manual seat belts to remain one of the options for complying with federal restraint system requirements." *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116, 1123-1124 (3d Cir. 1990).

> greater protection to those individuals who already use lap and shoulder seat belts. Nevertheless, these individuals will have to pay more for their automobiles, without any measurable benefit * * *.

Moreover, Secretary Coleman was concerned about the "feasibility" of manufacturing millions of reliable passive restraints. *Id.* at 24,072.

The Secretary also justified his decision to reject a passive restraint requirement by referring to public opinion (Department of Transportation, *The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection*, at 11-12 (Dec. 6, 1976)):

> The cause of safety would not be served by mandating passive restraints at the present time. Every sampling of public opinion which has been brought to my attention, including the analysis of the docket for the public hearing, indicates that a substantial majority of Americans oppose the Federal government's mandating passive restraints * * *. There is widespread and serious concern among members of the public with respect to the likelihood and consequences of inadvertent air bag deployment, the possibility that airbags may cause or exacerbate injuries, and the question of whether airbags will deploy properly in situations in which they are needed.

Secretary Coleman further determined that mandatory passive restraint systems would have serious adverse effects on federal policy goals for motor vehicle safety (*id.* at 32):

> A decision to mandate passive restraints would be unique and of unprecedented magnitude in the history of Federal involvement in motor vehicle safety. It would involve replacing seat belts, which are effective when used, with systems which have operating characteristics unlike any other safety equipment now in automobiles and with which many people are totally unfamiliar. It would mean mandating a particular form of self-protection which (in the case of the air bag) is among the most costly safety devices ever Federally required.

After considering all of these factors, Secretary Coleman found that a passive restraint requirement would provoke "widespread negative public reaction" and precipitate a repeal of the standard by

Congress after the manufacturers had retooled their production facilities. He concluded that such action "would have disastrous economic consequences for the entire nation." *Id.* at 11. A passive restraint requirement would ultimately "constitute a general setback to the auto safety movement." *Id.* at 64.

In 1977, after further hearings, Secretary Coleman's successor, Brock Adams, reaffirmed that passive restraints should not be mandated. He concluded that automobile manufacturers should be required to install some type of passive restraint system in the future, but specifically rejected a rule that would order immediate installation of airbags or any other passive restraint system in view of the severe technological and practical difficulties that such a requirement would cause. 42 Fed. Reg. 34,295, 34,296 (1977). Secretary Adams emphasized that "the Department has determined that a lead time of four full years should precede the requirement for the production of the first passive-equipped passenger cars." *Id.* at 34,295.

In response to this proposal, Congress intervened again by declaring its opposition to a mandatory passive restraint standard and its continuing approval of manual seat belts. It provided in DOT's annual appropriation legislation for 1979 and 1980 that "[n]one of the funds appropriated under this Act shall be used to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system)." 92 Stat. 450 (1978); 93 Stat. 1039 (1979). In forbidding the use of federal funds to mandate any "occupant restraint system" other than "a belt system," Congress distinguished between the familiar and publicly acceptable "active restraint system, which is the lap-shoulder belt that we have on cars today," and "a passive restraint system, which in practice means the airbag for large cars, and the automatic seat belt for small cars." 125 Cong. Rec. 36,924, 36,926 (1979).

Following the direction of Congress, Secretary of Transportation Drew Lewis decided against passive restraints in 1981, concluding that manufacturers should "continue to have the current option of providing either automatic or manual occupant restraints." 46 Fed. Reg. 53,419, 53,425 (1981). That decision was later set aside by this Court on the ground that the Secretary's

decision was not adequately explained. The Court affirmed, however, the Secretary's power to suspend any passive restraint requirement pending further agency review, *State Farm*, 463 U.S. at 57 n.21, and the Secretary promptly did so. 48 Fed. Reg. 39,908 (1983).

On remand, Transportation Secretary Elizabeth Dole conducted a "thorough review of the issue of automobile occupant protection," including a study of the voluminous regulatory record on the subject. 49 Fed. Reg. 28,962, 28,964, 28,967-28,975, 28,984-28,996 (1984). The Secretary again rejected an immediate mandate of passive restraints. The standard adopted by Secretary Dole was in effect when Honda manufactured the 1987 Accord.

C. The 1984 Amendment Of FMVSS 208

As amended by Secretary Dole in 1984, FMVSS 208 called for careful implementation of passive restraints over time. The final rule explicitly authorized manufacturers to continue to use manual three-point seat belts on all automobiles manufactured before September 1, 1986. 49 Fed. Reg. 28,963, 29,009-29,010 (1984). FMVSS 208 also authorized the continued use of manual seat belts in all automobiles manufactured after September 1, 1986, if a designated number of States enacted mandatory seat belt use laws complying with federal requirements. *Id.* at 28,963, 28,997-28,999, 29,010. Thus, seat belts and not airbags were the occupant restraint system of choice for DOT. Even in the event that state seat belt use laws were not enacted, FMVSS 208 continued to authorize a substantial percentage of automobiles to be equipped with manual seat belts prior to September 1, 1989. *Id.* at 28,963, 28,999.

Most significantly, the standard adopted by Secretary Dole in 1984 — like the standards adopted by all of her predecessors — *explicitly rejected a mandatory airbag requirement* and reaffirmed the need to encourage automobile manufacturers to develop a variety of alternative occupant restraint systems. 49 Fed. Reg. at 29,000-29,002. And contrary to petitioners' suggestion (Pet. Br. 11-12), there is absolutely no indication in the record that Secretary Dole believed the States could mandate airbags through common law liability rules. Indeed, in refusing to mandate airbags, Secretary Dole cited several fundamental considerations of federal

safety policy that would be severely undermined by any state-imposed airbag requirement.

1. The Secretary found (49 Fed. Reg. at 28,985) that there was substantial uncertainty about the effectiveness of airbags:

> Based on field experience through December 31, 1983, * * * the computed airbag and manual belt effectiveness (as used in the equivalent cars) for fatalities is now the same. This means that airbags would not save any more lives than the belt systems as used in those cars.

The Secretary also identified other serious unresolved safety problems with the deployment of airbags. *Id.* at 28,974, 29,001.

2. Secretary Dole found that airbags are "unlikely to be as cost effective" as other safety devices. 49 Fed. Reg. at 29,001. She explained that airbags may be "priced much higher than it has [been] estimated" and that such costs would "further compound" the safety problems associated with airbags because "the high cost of replacing an airbag may lead to its not being replaced after deployment. The result would be no protection for the front seat occupants of such an automobile." *Ibid.*

3. Secretary Dole noted that "[s]everal technical problems concerning airbags have been mentioned by manufacturers, consumers, and the vehicle scrapping industry." 49 Fed. Reg. at 29,001. Those included hazards from propellants used to inflate airbags and the danger to small children who may not be properly restrained and hence may be severely injured by a rapidly deploying airbag. Thus, "the Department cannot state for certain that airbags will never cause injury or death to a child." *Id.* at 28,992. The Secretary remarked that these unresolved safety problems made DOT unwilling to "mandate across-the-board airbags." *Id.* at 29,001.

4. The Secretary expressed reservations about the "public acceptability" of airbags. She explained that "[s]ome people have serious fears or concerns about airbags. If airbags were required in all cars, these fears, albeit unfounded, could lead to a backlash affecting the acceptability of airbags." 49 Fed. Reg. at 29,001. The Secretary added that "these consumer perceptions must be recognized as real concerns." *Ibid.* She emphasized that "[t]he

ability to offer alternative devices should enable the manufacturers to overcome any concerns about public acceptability by permitting some public choice." *Id.* at 28,997.

5. The Secretary decided that a mandatory rule requiring installation of a particular passive restraint device, such as airbags, would stifle innovation in occupant protection systems (49 Fed. Reg. at 29,001):

> [DOT] believes that by taking away the manufacturers' discretion to comply with an automatic occupant restraint requirement through the use of a variety of technologies, it creates a number of problems. First, by restricting the manufacturers, the Department runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems. Similarly, the development of passive interiors, being pursued by GM, would be stymied under such an option.

Thus, Secretary Dole specifically found that a mandatory airbag requirement would be contrary to federal safety goals because it "runs the risk of killing or seriously retarding the development of more effective, efficient occupant protection systems." *Ibid.*

D. The Subsequent Reviews Of The Occupant Restraint Standard By Congress, The D.C. Circuit, And DOT

Following Secretary Dole's decision not to require manufacturers to install airbags, the D.C. Circuit reviewed and affirmed that decision in *State Farm Mutual Auto. Ins. Co.* v. *Dole*, 802 F.2d 474 (D.C. Cir. 1986). The court noted that the Secretary's "ultimate decision not to require airbags" rested on a meticulous weighing of competing interests and a specific finding that the high costs associated with airbags threatened to *reduce* public safety. *Id.* at 487-488 & n.27. The court emphasized that "such details of cost-benefit analysis are 'most appropriately entrusted to the expertise of an agency.'" *Id.* at 488; see *Public Citizen* v. *Steed*, 851 F.2d 444, 447-448 (D.C. Cir. 1988) (affirming DOT's 1987 decision extending the option of driver-side-only airbags to September 1, 1993, and DOT's finding that serious technical issues remained unresolved with dual (driver-side and passenger-side) airbags).

Congress later amended the Safety Act in 1991 to require DOT to modify FMVSS 208 to mandate airbags in 95% of all passenger cars built after September 1, 1996, and 100% of the cars built after September 1, 1997. Pub. L. No. 102-240, § 2508, 105 Stat. 2085 (1991). In passing this legislation, Congress noted in Section 2508(d) that it did not seek to change the preemptive effect of FMVSS 208 for motor vehicles manufactured without airbags *before* they were required by federal law. See 49 U.S.C. § 30127(f)(2) ("[t]his section and amendments to Standard 208 made under this section may not be construed as indicating an intention by Congress to affect any liability of a motor vehicle manufacturer under applicable law related to vehicles with or without [airbags]").

Since then, DOT — through the National Highway Traffic Safety Administration ("NHTSA") — has undertaken "a comprehensive plan of rulemaking and other actions * * * addressing the *adverse* effects of air bags." 62 Fed. Reg. 798 (1997) (emphasis added). As early as October 1994, NHTSA noted the "air bag/infant restraint interaction problem" caused by the incompatibility of rear-facing infant car seats and passenger-side airbags. 59 Fed. Reg. 51,158, 51,159 (1994).

Over time, NHTSA has acknowledged broader problems with airbags, stating that they "are not a cure-all for every type of injury in crashes" and that airbags "have contributed to serious injuries and even death to vehicle occupants." 60 Fed. Reg. 56,554 (1995). The agency has been "extremely concerned * * * about deaths caused by air bags," 61 Fed. Reg. 40,784, 40,787 (1996), observing that "while passenger side air bags are estimated to have saved 164 lives to date, they have also killed 32 children in relatively low speed collisions." 62 Fed. Reg. 798 (1997).[7]

As a result, NHTSA (i) ordered warnings posted in motor vehicles about the hazards of airbags and the need to use manual three-point seat belts to reduce those hazards, 61 Fed. Reg. 60,206 (1996); (ii) allowed manual cut-off switches to be installed, 62 Fed. Reg. 62,406 (1997); and (iii) authorized manufacturers to "depower

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[7] NHTSA acknowledged in 1998 that over 100 persons had been killed by deploying airbags. 63 Fed. Reg. 49,958, 49,959 (1998).

all air bags so that they inflate less aggressively." 62 Fed. Reg. 12,960 (1997). Congress also has mandated, Pub. L. No. 105-178, § 7103(a), 112 Stat. 466 (1998), and DOT has proposed, the development of "advanced airbags" to "cushion and protect occupants of different sizes, belted and unbelted, [which] would require air bags to be redesigned to minimize risks to infants, children, and other occupants," 63 Fed. Reg. 49,958 (1998); see also 64 Fed. Reg. 60,556 (1999).

In sum, contrary to the suggestion of petitioners and their *amici* (Pet. Br. 7-9; see, *e.g.*, AIEG Br. 7), airbags were not in 1987, and are not today, a costless panacea that was irrationally resisted by motor vehicle manufacturers. However inevitable the introduction of airbags may seem from the perspective of 1999, in 1987 (when the Accord at issue here was built) airbags were perceived as merely one among many occupant restraint systems whose safety and public acceptability had to be tested.[8] The debate over the wisdom of mandatory airbags and the development of airbag technology continues to the present day. Accordingly, seat belts were and are DOT's occupant restraint device of choice; airbags are merely a supplemental restraint system (see pages 12-15, *supra*).

II. PETITIONERS' COMMON LAW CLAIM WOULD FRUSTRATE THE PURPOSES OF FMVSS 208

Petitioners do not dispute that Honda's 1987 Accord, which was equipped with a manual three-point lap belt and shoulder harness, complied fully with FMVSS 208. In particular, the automobile was not required by FMVSS 208 to have airbags; the Safety Standard in effect at the time the vehicle was manufactured granted Honda an option — for safety reasons — to install either airbags or manual lap and shoulder belts. Indeed, in 1987 Secretary Dole reaffirmed the need for flexibility and choice in passive restraint systems, 52 Fed. Reg. 10,096 (1987), and noted that federal safety policy purposefully did not "require

[8] See Pet. App. 15-16 ("Even if the Secretary's gradual adoption of an airbag requirement has increased public acceptance of the technology over time, concerns about public reaction still existed when Geier's 1987 Honda was manufactured").

manufacturers to install airbags or any other particular type of automatic restraint system." *Id.* at 42,441.

Petitioners' effort to impose a mandatory airbag requirement on Honda under state law conflicts with and undermines this federal safety policy. As this Court has long held, state law that conflicts with federal law — either by making it impossible "to comply with both state and federal requirements," *English* v. *General Electric Co.*, 496 U.S. 72, 79 (1990), or by standing "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 53, 67 (1941) — is preempted by the Supremacy Clause. See also *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987) (state law "is pre-empted if it interferes with the methods by which the federal statute was designed to reach [its] goal").

In this case, regardless of the scope of the express preemption provision, petitioners' common law claims are impliedly preempted by the Safety Act. It is undisputed that Congress gave DOT plenary authority to issue uniform national safety standards for automobiles and that DOT, after a thorough investigation extending over decades, determined that public safety would be undermined if airbags were required in the 1987 Accord. It would frustrate the purpose of this comprehensive federal safety scheme for the States to second-guess the judgment of this expert federal agency and impose just such a requirement.

Petitioners' principal response is to cite the language of the Section 1397(k), the Act's so-called "savings" clause. But this provision does not preserve or validate petitioners' claim. This Court has held for nearly a century that even broadly written savings provisions do not "save" state law claims that would conflict with or frustrate the purpose of a federal statute. Any other reading would cause the federal statute to "destroy itself." *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

Petitioners' arguments would turn federal preemption law upside down. They assert that — despite the comprehensiveness of the federal motor vehicle safety program, the clarity of Congress' purpose in reserving to DOT the authority to issue uniform national standards, and the presence of a broadly worded preemption

provision — Congress meant to allow each State, through its common law, to impose standards different from the federal standards (and different from those of other States as well). Rather than a scheme of uniform national standards, the outcome under petitioners' regime would be chaos, with standards varying from State to State — and even within a single State — based on the case-by-case assessments of lay juries. Congress could not conceivably have intended that result.

A. Section 1397(k) Does Not Preserve Common Law Claims That Are Inconsistent With An FMVSS

Petitioners' reliance on Section 1397(k) of the Safety Act, the so-called "savings" clause, to defeat implied conflict preemption is wholly misplaced. Even if, contrary to the text, structure, and legislative history of the statute (see pages 4-14, *supra*), Section 1397(k) were viewed as a limitation on the Act's *express* preemption provision, it has no application to an *implied* preemption analysis.

This provision indicates, at most, Congress' intent not to occupy the entire field of motor vehicle safety, so that common law claims could continue to be brought in areas *not* covered by and *not* conflicting with a Federal Motor Vehicle Safety Standard. Faced with similar provisions in other statutes, this Court has consistently interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, (1981), for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose common law liability for acts expressly permitted by a federal agency, the Court explained that general savings clauses do not allow States to enforce state law claims that conflict with federal law. *Id.* at 328. Rather, general savings clauses are included in federal statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute — not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections — but to preserve all existing rights which were not inconsistent with those created by the statute." And in *Abilene Cotton*, 204 U.S. at 446, the Court held that a broad savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.* This Court has repeatedly adhered to these pronouncements. See, *e.g.*, *American Tel. & Tel. Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998) (relying on and quoting *Abilene Cotton* in rejecting a construction of a savings clause that would have permitted common law claims that were "'inconsistent with the provisions of the'" federal statute at issue); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-385 (1992); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493-494 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976).

Consistent with these precedents (which petitioners neglect to cite, much less discuss), Section 1397(k) was added to the Safety Act not to defeat the statutory goal of creating a set of nationally uniform motor vehicle safety standards, but rather to indicate Congress' intent not to preempt the remainder of the field of motor vehicle safety *not* covered by and *not* inconsistent with those federal standards. This case is a good example: FMVSS 208 expressly grants, for safety reasons, a choice to manufacturers whether to use airbags. Section 1397(k) would thereby preserve a common law claim that an airbag system in a vehicle was negligently manufactured or installed, because those subjects are not addressed by — and do not conflict with — any Safety Standard. On the other hand, it would not preserve a common law action, such as the claim under review here, seeking to recover damages from a defendant merely for exercising the federally-granted safety option

to utilize a restraint system other than an airbag. Such a lawsuit is impliedly preempted because it extinguishes a choice granted, as a matter of safety, by DOT whether to install a particular type of equipment (airbags). See, *e.g.*, *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (distinguishing a failure-to-install-airbag claim from a claim that a particular airbag system was not properly designed, and holding that the latter claim is not preempted).[9]

Rather than addressing these precedents, petitioners rely (Br. 33-34, 47-48) on *English* v. *General Elec. Co.*, 496 U.S. 72 (1990), *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988), and *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), for the proposition that Congress somehow intended, through the adoption of Section 1397(k), to allow state common law to apply unchecked by any form of federal preemption. But none of the cases cited involved the Safety Act or even remotely similar regulatory schemes. In *Goodyear Atomic*, for example, the Court interpreted a statute waiving the federal government's immunity from state regulation of federal enclaves. In discussing the limits of that waiver, and whether state workers' compensation awards would interfere with a federal program, the Court distinguished between a State's "incidental" and "direct" regulation of federal activities. The Court ultimately concluded that there was "clear congressional authorization" for the state action (486 U.S. at 182) and that the "incidental regulatory pressure" of occasional workers'

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[9] This reading of Section 1397(k) is in accord with the early case law interpreting the Safety Act (which is relied on by petitioners, see Pet. Br. 2 n.2). In the absence of a federal Safety Standard addressing the same aspect of performance as a proposed common-law tort standard, Section 1397(k) authorizes a tort action to proceed because the Act does not preempt the entire field of motor vehicle safety. See, *e.g.*, *Schwartz* v. *American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983) ("there were no federal standards governing the relevant portions of the" vehicle); *Dorsey* v. *Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981) (FMVSS's "are unrelated to several of the design deficiencies developed by the plaintiffs' evidence"); *Dawson* v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980); *Knippen* v. *Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976).

compensation awards was fully consistent with the federal scheme. *Id.* at 186. In particular, there was no claim in *Goodyear Atomic* that state law would frustrate any federal regulation or policy.

The decisions in *English* and *Silkwood* are equally beside the point. Both cases involved preemption under the Atomic Energy Act, which explicitly preserves significant authority for the States (*e.g.*, 42 U.S.C. §§ 2018, 2021(b), 2021(k)). In *Silkwood*, the Court found no preemption of the common law claim at issue because the Price-Anderson Act — which established an indemnification scheme for nuclear plant operators held liable under state tort law — constituted affirmative evidence of Congress' acceptance of state tort actions (464 U.S. at 251-256).[10] As the Court explained in *English*, 496 U.S. at 86, "the decision in *Silkwood* was based in substantial part on legislative history suggesting that Congress did not intend to include in the pre-empted field state tort remedies for radiation-based injuries."

These cases stand in marked contrast to the federal scheme created by the Safety Act — on which the regulatory effects of state compensatory and punitive damages awards would be direct, not incidental. See *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 498-499 n.19 (1987) (rejecting the contention that "compensatory damages only require the [defendant] to pay * * * and thus do not 'regulate'"); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277-278 (1964) (holding that common law claims are "'a form of regulation'"); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.").

In the final analysis, petitioners grossly misconstrue Section 1397(k) of the Safety Act by attributing to Congress the truly

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[10] *Silkwood* was a field preemption case; there was no conflict with a federal regulation. The sole question in the case was whether federal law preempted state punitive damages awards. It was common ground among the Justices that Congress intended to permit state tort claims for compensatory damages. Thus, *Silkwood* involved the availability of a particular remedy, not the question whether a state tort action was foreclosed by federal law.

perverse desire to authorize all common law claims even though they clash with an existing Safety Standard. Thus, as petitioners read this provision, it would even "save" a common law claim that a manufacturer acted tortiously by doing something that was required by federal law or by not doing something that was prohibited by federal law.

But petitioners cannot explain why Congress would allow the States to undermine a federal regulatory scheme of national safety standards so long as they act through their common law and not through regulatory or statutory enactments. Under this regime, a jury in California or New York might decide that airbags are necessary to meet a common law duty of care; while a jury in Texas or Florida might decide that airbags are dangerous and breach common law standards in those jurisdictions. The adverse effects on safety and interstate commerce of this system of nonuniform standards are clear.

In advancing a construction of the Safety Act that undermines its carefully drawn system of nationally uniform safety standards, petitioners fail to heed this Court's admonition not to interpret a statute to "destroy itself." *Abilene Cotton Oil Co.*, 204 U.S. at 446. Their interpretation of Section 1397(k) must therefore be rejected.

B. Implied Conflict Preemption Is Fully Applicable Under The Safety Act

Relying again on Section 1397(k) and this Court's preemption analysis in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 517 (1992), petitioners contend that the text of the Safety Act provides a "reliable indicium of congressional intent" to preclude implied conflict preemption. Pet. Br. 35-41. Thus, petitioners assert (*id.* at 37-40) that the absence of any reference to preemption of common law claims in the text or history of the Safety Act or FMVSS 208, combined with the language of Section 1397(k), show a congressional "*intent not to preempt*." Pet. Br. 39 (emphasis in original).

Contrary to petitioners' arguments, neither Section 1397(k) nor the express preemption provision in the Safety Act precludes application of this Court's traditional principles of implied conflict

preemption. As discussed above (at pages 6-8), Section 1397(k) is not addressed to implied conflict preemption at all. Moreover, the express preemption provision in the Safety Act does not bar implied conflict preemption. This Court has emphatically and unequivocally rejected the proposition "that implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute." *Myrick*, 514 U.S. at 287. The *Myrick* Court dismissed this argument as premised on a plain misreading of a single sentence in *Cipollone*, in which the Court had observed (505 U.S. at 517):

> When Congress has considered the issue of implied pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone* v. *White Motor Corp.*, 435 U.S. [497], at 505 [(1978)], "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

The Court rejected as entirely "without merit" any interpretation of this sentence that would preclude an implied preemption inquiry in the face of an express preemption clause. 514 U.S. at 285. "The fact that an express definition of the pre-emptive reach of a statute 'implies' — *i.e.*, supports a reasonable inference — that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption." *Ibid.* Congressional intent is ultimately the "touchstone" in determining whether implied preemption is foreclosed. *Malone*, 435 U.S. at 504.

Thus, the Court held in *Myrick* that the express preemption provision in the Safety Act does *not* "obviate the need for analysis of [the] * * * statute's [implied] pre-emptive effects." 514 U.S. at 285. The Court in that case considered *on the merits* the respondent's implied preemption argument under the Safety Act, although it found the claim "ultimately futile" because there was no conflict between the respondent's tort suit and the suspended standard at issue, FMVSS 121, which governed antilock brakes on trucks. 514 U.S. at 285; see also Pet. App. 13 ("in *Myrick* the

Supreme Court engaged in implied pre-emption analysis of the Safety Act").[11]

This Court's subsequent precedents are in accord. For example, in *Medtronic*, the plurality opinion by Justice Stevens — which in the face of an express preemption clause found no express preemption under the Medical Device Amendments of 1976 to the Federal Food, Drug, and Cosmetic Act — pointedly observed that common law claims might still be "preempted under conflict preemption analysis." 518 U.S. at 503; see also *id.* at 507 (Breyer, J., concurring) (citing "ordinary principles" of conflict preemption). And in *Boggs* v. *Boggs*, 520 U.S. 833 (1997), the Court decided the case on the basis of implied conflict preemption under the Employee Retirement Income Security Act even though that statute has an express preemption clause. Indeed, the Court has often considered (and accepted) implied preemption arguments in cases involving federal statutes with express preemption provisions.[12]

At the end of the day, it is hard to imagine any reason why Congress, simply by including an express preemption provision in

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[11] The Court in *Myrick* also noted that even in *Cipollone*, "just two paragraphs after the [misinterpreted] passage * * * [the Court] engaged in a conflict pre-emption analysis of the Federal Cigarette Labeling and Advertising Act * * * and found 'no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damages actions.'" 514 U.S. at 288-289.

[12] See, *e.g.*, *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142-143 (1990); *Northwest Cent. Pipeline Corp.* v. *Kansas Corp. Comm'n*, 489 U.S. 493, 509-522 (1989). In *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977), the Court concluded that, although the express preemption provision of the Fair Packaging and Labeling Act, 15 U.S.C. § 1461, did not preempt the state law at issue, the Supremacy Clause prohibited enforcement of that law because it conflicted with the federal statute and prevented "the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 526, 540-543 (internal quotation marks omitted). The Court held that "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict." *Id.* at 525-526.

the Safety Act, would have wanted to authorize the States to impose requirements that conflict with or frustrate the purposes of an FMVSS. Congress often includes an express preemption provision in a statute because it wants to preempt state law *more broadly* than would occur under implied preemption principles. It is absurd to assume that Congress intends to eliminate the constitutional baseline of implied preemption (see *Brown* v. *Hotel & Restaurant Employees*, 468 U.S. 491, 501 (1984)) when it legislates to give a federal statute *additional* preemptive effect.[13]

C. Petitioners' Common Law Claim Would Frustrate The Purpose Of DOT's 1984 Decision And Would Undermine Congress' Goal Of Creating Uniform National Standards

Turning finally to the merits of the preemption issue before the Court, petitioners try to show that their common law "no airbag" claim somehow does not conflict with or undermine FMVSS 208. Pet. Br. 41-50. But, as all five federal courts of appeals to consider the issue have concluded, a common law standard such as that proposed by petitioners is impliedly preempted because it would punish a manufacturer with massive tort liability for exercising a federally granted *option* not to install airbags in its automobiles. Petitioners' claim would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in passing the Safety Act, *Hines*, 312 U.S. at 67, and would "interfere[] with the methods by which th[at] federal statute was designed to reach [its] goal." *Ouellette*, 479 U.S. at 494.

In this case, as the Solicitor General has explained (see U.S. Br. 15-29), a collision between state and federal law is inevitable. The central feature of the federal safety program codified in FMVSS 208 is a carefully calibrated plan to provide the automobile industry with occupant restraint options. See *Pokorny*, 902 F.2d at

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[13] Certainly, when it enacted the Safety Act in 1966, Congress could not possibly have known that its inclusion of a preemption provision and Section 1397(k) in the Act would eliminate implied conflict preemption, which this Court had long held occurs by direct operation of the Supremacy Clause. See *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963).

1124 ("flexibility and choice is an essential element of the regulatory framework established in Standard 208"). As the D.C. Circuit found (Pet. App. 14-16) and as we described in detail above (at pages 12-14), DOT's goal was to provide design flexibility over time to foster technological innovation that would make passive restraint systems acceptable to the general public. Moreover, DOT sought to encourage manufacturers to experiment with different passive restraint technologies, rather than to mandate "all airbag" fleets, in order to develop empirical data concerning the relative effectiveness of various restraint systems.

The element of "choice" in the federal program was, therefore, not an expression of neutral indifference to airbags by DOT, but a purposeful element of the program designed to address the serious, substantive doubts about the effectiveness, public acceptability, and feasibility of requiring the industry to adopt airbags prematurely. In view of the consumer (and congressional) opposition to passive restraints — particularly airbags — DOT deliberately conferred flexibility on manufacturers to allow them to introduce new restraint technology on a gradual basis.

By contrast, the state law tort standard advocated by petitioners would punish automobile manufacturers for not taking the very step that the federal program refused to mandate: installing airbags in 1987-model-year automobiles. The effect of upholding such liability would be directly to nullify the policy balances that are at the heart of FMVSS 208. It is difficult to imagine a clearer example of state law acting as an "obstacle" to the "accomplishment and execution" of a federal administrative program — a program with "an intricate and contentious history of over 20 years" that has involved intensive administrative and congressional attention and effort. *Wood*, 865 F.2d at 398. During that time, "[m]ost of this national controversy has concerned the very issue which underlies [petitioners'] claim, namely, * * * whether vehicles should be equipped with 'passive restraints' * * * such as airbags." *Id.* at 399.

Thus, the common law standard petitioners advocate would conflict with FMVSS 208 in several direct and obvious ways:

1. The imposition of massive tort liability for the failure to install airbags in automobiles that comply with FMVSS 208 would

strip away an option (and attendant manufacturing flexibility) that Congress and DOT believed to be essential to achieve federal policy goals. See *Pokorny*, 902 F.2d at 1124-1125; *Taylor*, 875 F.2d at 827; Pet. App. 14 (DOT was concerned that "not affording manufacturers discretion to install an automatic occupant restraint system" would undermine "public safety"). Among other things, DOT sought to encourage "experimentation with designs for even safer systems." *Id.* at 15.

Petitioners' attempt to mandate airbags — and thus eliminate the "several options" authorized by federal law, Pet. App. 15 — cannot survive application of this Court's longstanding precedents holding that any state law that removes or restricts an option granted by a federal regulation conflicts with federal law and is preempted. In *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982), for example, the Court held that a federal regulation granting federal savings and loan associations the option of including "due-on-sale clauses in their contracts" preempted California common law, which provided that due-on-sale clauses were unenforceable. California common law was preempted because it purported to give "the California courts * * * [authority to] forbid[] a federal savings and loan to enforce a due-on-sale clause solely 'at its option' and * * * deprived the lender of the 'flexibility' given it by the" federal regulation. *Ibid.* See also *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 708-709 (1984) (state law cannot deprive regulated entities of "flexibility and discretion" deliberately conferred by federal law); *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256, 260-261, 270 (1985) (state law is preempted to the extent it eliminates "flexibility" contemplated by federal law).

2. A common law airbag rule would punish automobile manufacturers — in an unforeseeable, retroactive manner and with unprecedented severity — for exercising a right granted to them by federal law. The States cannot impose common law damages, including punitive damages, on parties for doing what federal law "authorized them to do." *Kalo Brick*, 450 U.S. at 318, 326-330 (a State cannot award damages on account of a railroad abandonment approved by the ICC); *Farmers Educ. & Coop. Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

3. Punishing manufacturers for failing to install airbags at a time when the federal government deliberately refused to mandate such equipment would clash directly and irreconcilably with the federal timetable for phasing in passive restraints:

> [I]mposition of an air bag requirement where none previously existed would conflict with the effective dates for the implementation of standard 208 and the purpose of gradually phasing in passive or automatic restraint systems. Clearly, such a result "stands as an obstacle" to the methods chosen by the Secretary of Transportation to administer the Act, and is incompatible with the federal regulations.

Schick v. *Chrysler Corp.*, 675 F. Supp. 1183, 1186 (D.S.D. 1987); see Pet. App. 15 (by "gradually phasing in airbags" DOT sought to "allow[] consumers to adjust to the new technology").

4. Application of a common law standard that conflicts with FMVSS 208 would "destroy the national uniformity of the federal standard." *Wood*, 865 F.2d at 412. Instead of uniformity, some States could punish manufacturers for not having four-point seat belts, others could require three-point seat belts, yet others frontal airbags (driver-side or passenger-side, front or rear), and still others motorized seat belts — or some combination of these and a host of other restraint devices. See *Kalo Brick*, 450 U.S. at 326 ("A system under which each State could, through its courts, impose * * * its own * * * requirements could hardly be more at odds with the uniformity contemplated by Congress"). The "unthinkable" situation feared by President Johnson 30 years ago ("50 standards for 50 different States" (112 Cong. Rec. 14253 (1966)) could become a reality.

5. Petitioners' position cannot be defended by the assertion that there is no frustration of Congress' purpose because both the federal regulatory scheme and the state common law seek to promote "safety." To reduce this carefully calibrated federal program to such a nebulous generalization is to suggest that the States are free to mandate *any* requirement that a lay jury is prepared to characterize as reasonably conducive to product safety — no matter what its effect on the federal program. But this Court expressly rejected that proposition in *Ouellette*, 479 U.S. at 494, explaining that "it is not enough to say that the ultimate goal of

both federal and state law is to eliminate [a risk to the public]. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal." As the First Circuit observed in *Wood*, 865 F.2d at 408:

> Even though the goal of [plaintiff's] design defect action might be the same as that of the Safety Act — that is, to increase automobile safety — [plaintiff's] theory of recovery is preempted by FMVSS 208 and the Safety Act because it interferes with the *method* by which Congress intended to meet this goal.

At bottom, "improving [automobile] safety does not admit to easy solution" and requires "considerable expertise." *State Farm*, 463 U.S. at 33. In the course of lengthy and comprehensive regulatory reviews during the 1970s and 1980s, the Secretaries of Transportation exercised that expertise and repeatedly concluded that a mandatory airbag requirement for automobiles would be *contrary* to federal safety goals because airbags present countervailing safety risks. As a result, in 1984 DOT expressly made airbags optional and thereby established a "policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." Pet. App. 15. Secretary Dole's decision thus specifically granted Honda the option *not* to install airbags in its 1987 Accord.

Since FMVSS 208 was amended by Secretary Dole in 1984, Congress, the courts, and DOT have reaffirmed the need for federal primacy in setting occupant restraint policies, as airbag technology has evolved and the benefits and dangers of airbags have become manifest. There is no room for the States to intervene to decide, for example, that manual cut-off switches for airbags — which are expressly authorized by DOT to address the risks posed to certain individuals by deploying airbags (see page 15, *supra*) — are unreasonably dangerous.

Allowing common law claims to set aside a determination of DOT's safety policies would unduly interfere with the regulatory means authorized by Congress to achieve the Safety Act's stated goals. In this case, DOT determined that federal safety policy required granting manufacturers the *option* whether to install airbags in 1987-model-year automobiles. Petitioners cannot, more

than a decade after the fact, second guess that judgment under state law. The Supremacy Clause will not permit that result.

CONCLUSION

The judgment of the court of appeals should be affirmed because petitioners' common law claim is impliedly preempted by the Safety Act and FMVSS 208.

Respectfully submitted.

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APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
Allegiance Healthcare Corporation
American Home Products Corporation
American Medical Systems, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Andrx Corporation
Anheuser-Busch Companies, Inc.
Appleton Papers, Inc.
Atlantic Richfield Company
BASF Corporation
Baxter International, Inc.
Bayer Corporation
Becton-Dickinson & Company
BIC Corporation
BIOMET
Black & Decker (U.S.) Inc.
BMW of North America, Inc.
Boeing Company, The
Bombardier Inc., Recreational Products
Bridgestone/Firestone, Inc.
Briggs & Stratton
Brown and Williamson Tobacco Company
Brown-Forman Corporation
Budd Company, The
C.R. Bard, Inc.
Caterpillar, Inc.
CLARK Material Handling Company
Coleman Company, Inc., The
Continental General Tire, Inc.
Coors Brewing Company
DaimlerChrysler Corporation
Dana Corporation
Deere & Company
Digital Equipment Corporation
Dow Chemical Company, The
E. & J. Gallo Winery

Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Estee Lauder Companies
Exxon Corporation, U.S.A.
FMC Corporation
Ford Motor Company
Fortune Brands, Inc.
Freightliner Corporation
Gates Corporation, The; Stant Corporation
General Electric Company
General Motors Corporation
Georgia-Pacific Corporation
Glaxo Wellcome Inc.
Global Industrial Technologies, Inc.
Goodyear Tire & Rubber Company, The
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
Heil Company, The
Hoechst Marion Roussel, Inc.
Honda North America, Inc.
Hyundai Motor America
International Paper Company
Isuzu Motors America, Inc.
Johnson & Johnson
Johnson Controls, Inc.
Joseph E. Seagram & Sons, Inc.
Kawasaki Motors Corp., U.S.A.
Kolcraft Enterprises, Inc.
Kraft Foods, Inc.
Loewen Group International, Inc.
Lucas Variety
Lucent Technologies, Inc.
Mack Trucks, Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Melroe Company
Mercedes-Benz of North America, Inc.
Michelin North America, Inc.

Miller Brewing Company
Mitsubishi Motors R. & D. of America, Inc.
Motor Coach Industries International, Inc.
Navistar International Transportation Corp.
Nissan North America, Inc.
O.F. Mossberg & Sons, Inc.
Otis Elevator Co.
PACCAR Inc
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Pfizer Inc.
Philip Morris Companies, Inc.
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SCM Group USA, Inc.
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Shell Oil Company
Sherwin-Williams Company, The
Siemens Corporation
Smith & Nephew, Inc.
SmithKline Beecham Corporation
Snap-on Incorporated
Sofamor Danek Group, Inc.
Solutia, Inc.
Sturm, Ruger & Co., Inc.
Subaru of America
Taylor Wharton Gas Equipment, A Division of Harsco
Tenneco Automotive
Terex Corporation
Textron Inc.
Thomas Built Buses, Inc.
Toro Company, The
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.

TRW Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.

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No. 98-1811

In The

Supreme Court of the United States

ALEXIS GEIER, et al.,

Petitioners,

vs.

AMERICAN HONDA MOTOR COMPANY, INC., et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit

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INTEREST OF THE AMICUS CURIAE

The Defense Research Institute ("DRI") is an organization with members throughout the United States numbering in excess of 21,000. It seeks to advance the cause of the civil justice system in America by ensuring that the concerns of the defense bar and potential defendants are properly and adequately represented. These objectives are accomplished through the publishing of scholarly material, educating the bar by conducting seminars on specialized areas of law, and through testimony before Congress and state legislatures on select legislation impacting the civil justice system. DRI provides a forum for the networking of state and local defense organizations who share a concern for the proper and efficient operation of the civil justice system.[1]

All parties have granted a blanket consent to the filing of *amicus curiae* briefs, including this brief.

I. SUMMARY OF ARGUMENT

Disappointed with the Secretary of Transportation's decision to phase-in mandatory installation of passive restraints in automobiles, but not require air bags,

[1] Pursuant to Rule 37(6) of the Rules of the Supreme Court of the United States, DRI states that counsel for Petitioners and Respondents had no part in authoring any portion of this brief. No one other than the DRI made a monetary contribution to the preparation or submission of this brief.

plaintiffs have attempted to mandate immediate installation of a single passive restraint system – the air bag – through litigation.

In numerous cases across the country plaintiffs have attempted to establish a new safety standard under state product liability law that punishes automobile manufacturers for exercising the option permitted under Federal Motor Vehicle Safety Standard 208 to not equip certain cars with air bags. This focus on state tort law has raised serious federalism questions, requiring courts to examine the relationship between state common law and the federal policy for safety standards embodied within the express language of the National Traffic and Motor Vehicle Safety Act ("Safety Act") and its corresponding regulatory scheme. The common law's ability to shape behavior has been central to this study.

While it does so in a case by case fashion, the common law often establishes new causes of action and sets new standards of behavior that transcend the facts and circumstances of the particular case. It does not simply provide individual plaintiffs with remedies for their individual injuries. There has not been a more powerful or influential body of common law than product liability.

Individual product liability decisions have created new standards for safety in a dizzying array of industries, have forced products off the market, raised consumer awareness, and changed the practices of whole industries. In most cases, these discrete judicial opinions are not based on the particular facts of the particular case. Rather, like legislative enactments, they are based on broad public policy concerns. For example, the decisions

that established modern product liability law were not based upon the particular needs of the individual plaintiffs before the court, but the desire to allocate the costs associated with product-related injuries so as to establish incentives for manufacturing safer products.

Due to the reasoning and broad-based influence of product liability decisions, this Court and every Circuit Court of Appeals that has addressed the issue has repeatedly held that state common law decisions have the same force and effect in shaping behavior as positive legislative enactments. As a result, common law decisions addressing product safety create a system of regulation that parallels the authority of federal regulation. Conflict between these equal authorities is inevitable. Where such conflict exists, federal law controls. This is the doctrine of federal preemption, dictated by the Supremacy Clause of the United States Constitution.

Petitioners and *Amicus Curiae*, The Association of Trial Lawyers of America ("ATLA"), as a necessary predicate to their argument against preemption, ignore the common law's basis in public policy and its historical power in changing or shaping industry behavior. They currently argue that the common law does nothing more than render vending-machine justice, doling out compensation in particular cases, without any immediate or prospective impact on manufactures' or consumers' behavior. Such a position is not only contrary to this Court's previous pronouncements and the recognized purpose and history of product liability common law, but is contrary to ATLA and other trial lawyers' historical strategy of using individual common law decisions as a coercive tool to change manufacturers' behavior.

Contrary to ATLA's stated position regarding the common law's impotence, the origins of product liability common law, its history, and ATLA's previous pronouncements all demonstrate that common law decisions can, and in fact do, exert the same coercive effect on external behavior and decision making as legislatively imposed standards. Common law decisions can impose a standard of performance that conflicts with the Safety Act's regulations. Therefore, the express language of the Safety Act's preemption clause requires this Court to find that the Safety Act and its regulatory scheme preempt state common law product liability actions that may result in a finding that a vehicle is defective because the manufacturer exercised an option permitted by federal law. Moreover, well established principles of implied preemption compel a conclusion in this case that the plaintiff's claim must be preempted because it conflicts with articulated federal policy on occupant restraints.

II. ARGUMENT

The American civil justice system is built upon the twin pillars of state and federal law. Where the two come into conflict, federal law is supreme. One of DRI's missions is to address questions that are germane to the functioning of our civil justice system.[2] With an

[2] The Defense Research Institute's Mission Statement provides:

> The Defense Research Institute is the national membership organization of all lawyers involved in the defense of civil litigation. DRI is committed to: enhancing the skills, effectiveness and professionalism of defense lawyers; anticipating and addressing issues germane to defense lawyers and the civil justice system; promoting appreciation of the role of the defense lawyer; and improving the civil justice system and preserving the civil jury.

expanding federally-regulated commercial environment, federal and state law increasingly have the potential to conflict. In order to recognize such conflicts, and thus function in accordance with both the Constitution's hierarchy of laws and congressional intent, courts must understand that product liability common law decisions influence a manufacturer's behavior as effectively as direct legislation.

The lower court in this case correctly understood this fact and, consequently, properly recognized that the Safety Act and state common law product liability actions have the potential for conflict in areas governed by federal law. It, therefore, correctly held the Safety Act preempts any state common law claims that seek to punish the failure to install air bags in a 1987 motor vehicle, because such an outcome would conflict with federal law.

A. The Laws of the United States "Shall be the Supreme Law of the Land". U.S. Const. art. VI cl. 2

"The supremacy clause of the United States Constitution dictates that when Congress has enacted legislation which is 'necessary and proper' to implement one of its plenary powers, any state law which comes into conflict

with the federal law is preempted." Timothy Wilton, *Federalism Issues in "No Airbag" Tort Claims: Preemption and Reciprocal Comity*, 61 Notre Dame L. Rev. 1, 12 (1986).

The Safety Act contains an express preemption clause, declaring that its regulatory scheme totally preempts any state law that imposes a duty on manufacturers different from the duties dictated by this regulatory scheme. It provides in relevant part:

> (b) Preemption. – (1) When a motor vehicle safety standard is in effect under this chapter, a State or political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

49 U.S.C. § 30103(b)(1). Congress' choice of the word "identical", rather than a more expansive term such as "consistent" manifests its intent to preempt all state standards that do not mirror the standards of the federal regulations promulgated under the Act. Wilton, 61 Notre Dame L. Rev. at 16.

B. Preemption Should not be Confused with Asserting Compliance with the Applicable Federal Law as a Defense to State Common Law Actions.

Petitioners and ATLA misconstrue the lower court's decision. Federal preemption was the basis of the lower court's decision. Federal preemption is the issue before this Court. ATLA, however, describes the lower court as

holding "that the compliance with Motor Vehicle Standard 208 immunizes automakers from product liability based on failure to install airbags . . . ".[3] ATLA fails to recognize the difference between the effect of federal preemption and the assertion of compliance with the federal regulations as a defense to a state product liability common law action.

The defense of compliance only exists within the context of a valid common law action. Specifically, the manufacturer asserts compliance with federal standards as its defense to the plaintiff's claim of defectiveness. If federal law preempts state common law, the court must select the federal standard, pursuant to the Constitution's Supremacy Clause, rather than the state standard when resolving the plaintiff's claim. Lars Noah, *Reconceptualizing Federal Preemption of Tort Claims as the Government Standards Defense*, 37 Wm. & Mary L.Rev. 903, 951 (1996). Simply, if preempted, no state common law claim exists. Therefore, whether the product is defective under state law is not at issue and, the issue of compliance as a defense never materializes. The Restatement (Third) of Products Liability explicitly adopts this analysis. It provides:

> An important distinction must be drawn between the [compliance as a defense to a claim of defectiveness] and the matter of federal preemption of state products liability law. [The Restatement's section on compliance as a defense] addresses the question of whether and

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[3] Amicus Curiae Brief of The Association of Trial Lawyers of America in Support of the Petitioners ("ATLA Brief"), p. 2.

to what extent, as a matter of state tort law, compliance with product safety statutes or administrative regulations affects liability for product defectiveness. When a court concludes that a defendant is not liable by reason of having complied with a safety design or warnings statute or regulation, it is deciding that the product in question is not defective as a matter of the law of that state. The safety statute or regulation may be a federal provision, but the decision to give it determinative effect is a state-law determination. In contrast, in federal preemption, the court decides as a matter of federal law that the relevant federal statute or regulation reflects, expressly or impliedly, the intent of Congress to displace state law, including state tort law, with the federal statute or regulation. The question of preemption is thus a question of federal law, and a determination that there is preemption nullifies otherwise operational state law . . . [W]hen federal preemption is found, the legal effect is clear. Judicial deference to federal product safety statutes or regulations occurs not because the court concludes that compliance with the statute regulation shows the product to be nondefective; the issue of defectiveness under state law is never reached. Rather, the court defers because, when a federal statute or regulation is preemptive, the Constitution mandates federal Supremacy.

Restatement (Third) of Products Liability, § 4, cmt. e, p. 122. The First Circuit Court of Appeals agrees. *See, Wood v. General Motors Corp.*, 865 F.2d 395, 417-18 (1st Cir. 1988).

The lower court in the present case entered summary judgment in Honda's favor on Plaintiff's state law claims because the Safety Act preempted them, not because of

Honda's compliance with Federal Motor Vehicle Safety Standard 208. Compliance was not an issue. As a result, both Petitioners' and ATLA's arguments are postured on a false premise, which undermines the remainder of their arguments. This incorrect foundation prevents both Petitioners and ATLA from engaging in a meaningful analysis of the common law's relationship to the federal regulations.

C. State Common Law Decisions Constitute Safety Standards Under the Federal Act.

The lower court in this case correctly recognized that the term "standard", as used in the Safety Act's preemption clause, prevents states from imposing "a duty on manufacturers that differs from those imposed by the federal government." *Geier v. American Honda Motor Corporation*, 166 F.3d 1236, 1240 (D.C. Cir. 1999). The court correctly acknowledged: "Common law liability in this specific context, therefore, can reasonably be viewed as constituting a 'standard' that might conflict with Standard 208." *Id.*

Petitioners and ATLA argue the lower court erred because "[a] verdict in a product liability action is not the functional equivalent of a state regulation requiring airbags in cars."[4] They view the common law as nothing more than a mechanism for providing individual plaintiffs with discrete compensation, without having effect beyond the particular case. ATLA writes, "the only requirement imposed by a product liability judgment is

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[4] ATLA Brief, pp. 5-9.

the obligation to compensate the plaintiff for the injury caused."[5] ATLA further argues that an adverse judgment in a particular product liability action will have no prospective impact on either the manufacturer's or other potential plaintiffs' behavior and will not affect any future litigation.[6]

These statements, however, conflict with both this Court's previous pronouncements and the holdings of all the Circuit Courts of Appeal that have addressed the issue. These statements also contradict the recognized purpose and history of product liability common law and, they are contrary to ATLA's previous strategy of using individual common law decisions as a coercive tool to change manufacturers' behavior and consumers' attitudes.

1. The Origin and History of Product Liability Common Law Demonstrates that it Creates Standards for Manufacturers' Behavior.

ATLA's contention that product liability common law has no prospective effect on manufacturers' behavior is incredible given the history and development of product liability law. Early product liability decisions were not based upon the courts' desire to compensate particular individuals in particular cases. Rather, these decisions reflected an intent to reallocate, from consumers to manufacturers, the costs associated with the production of dangerous products and thereby compel manufacturers

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[5] ATLA Brief, p. 6.

[6] ATLA Brief, pp. 6-8.

to make safer products. These development decisions show that the courts used the imposition of common law duties as the mechanism to accomplish this public policy goal. Specifically, with such duties in place, the courts compelled manufacturers to absorb, through adverse court decisions, the costs associated with the manufacture of products that did not conform to these new duties.

For example, prior to Judge Cardozo's opinion in *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 111 N.E. 1050 (N.Y.Ct.App.1916), manufacturers did not owe any duty to the ultimate purchasers of their products, but only to those with whom they contracted. Judge Cardozo, however, relying upon various common law decisions, determined that the privity requirement should not limit manufacturers' duties. He found that manufacturers owed a duty not only to the direct purchaser of the product in question, but also to those individuals they could foresee would use their product. Thus began "the fall of the citadel of privity," the parabolic increase in manufacturers' potential liability, and the judiciary's policy to reallocate, from consumers to manufacturers, the responsibility to prevent injury to those using their products. William Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn.L.Rev. 791, 791 (1966).

Justice Traynor's words in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944), made explicit the courts' policy of reallocating the costs of accidents to influence manufacturers' behavior. He stated, "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *Id.* at 440. In other words, if manufacturers face liability for

their production of unreasonably dangerous products, they will make safer products and, thus, "reduce the hazards to life and health". Similarly, the court in *Greenman v. Yuba Power Products, Inc.*, 377 N.E.2d 897, 901 (Cal. 1963), recognized strict liability as a viable claim against a product manufacturer because adverse decisions from such claims would effectively force manufacturers to avoid production of dangerous products.

Just five years later the development of product liability common law reached new heights. In *Larsen v. General Motors Corporation*, 391 F.2d 495 (8th Cir. 1968), the judiciary again expanded, largely on public policy grounds, automobile manufacturers' duties to include the duty to design their products so that they do not expose their occupants to an unreasonable danger in the event of a collision. The court in *Larsen* recognized this new duty, not as a method of compensating the particular plaintiff, but as a mechanism to alter manufacturers' behavior for the public welfare. The court explicitly stated, "(l)egal acceptance of this [new] duty would go far in protecting the user from unreasonable risks." *Id.* at 504. Thus, the court correctly recognized, as did the lower court in this case, that the threat of financial responsibility due to a breach of a common law duty forces manufacturers to conform their behavior to the dictates of this duty.

The lower court's decision in the present case is consistent with these early product liability decisions. It recognized, contrary to Petitioners' and ATLA's arguments, that product liability law did not develop simply to compensate particular individuals injured in particular accidents. Rather, like legislation, product liability decisions focus on public policy concerns of reallocating

safety expenses and the ability to coerce manufacturers into producing safer products for consumers' welfare. The lower court correctly held, consistent with history, that product liability decisions set standards of performance with which manufacturers must comply. Any position to the contrary ignores history and distorts reality.

2. This Court Has Explicitly Held That Common Law Tort Actions Establish Affirmative Standards of Conduct as Effectively as Legislative or Administrative Standards.

On numerous occasions, when performing preemption analyses, this Court has confronted arguments that jury verdicts, pursuant to common law claims, do not establish regulations, standards or requirements and, thus, are not preempted by federal statutes or administrative regulations. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *see also Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15 (1987) (referring to "safety standards" set by California product liability law). In each instance, however, this Court has mandated that common law actions, whether based upon state or federal law, establish standards of conduct, that alter behavior effectively as legislative or administrative enactments. *See Medtronic*, 518 U.S. at 510-11 (O 'Connor, J. concurring joined by Rehnquist, Ch. J., Scalia and Thomas, JJ.; *id.* at 504 (Breyer, J. concurring); *Cipollone*, 505 U.S. at 522-23; *CSX Transp.*, 507 U.S.

at 397; *Ouellette*, 479 U.S. at 495; *Garmon*, 359 U.S. at 247. This Court addressed this issue in *Cipollone* and said:

> [C]ommon law damages actions of the sort raised by petitioner are premised on the existence of the legal duty and it is difficult to say that such actions do not impose "requirements or prohibitions." . . .
>
> [I]t is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions.

505 U.S. at 522.

Further, on numerous occasions, this Court has approvingly quoted the following language from *Garmon* in support of this proposition:

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

359 U.S. at 247. In fact, Justice Breyer recognized that, from the perspective of a manufacturing defendant, there is virtually no distinction between the duty imposed by common law verdict and legislative or administrative provisions. Justice Breyer, in *Medtronic*, wrote:

> The effects of the state agency regulation and the state tort suit are identical. To distinguish between them for preemption purposes would

> grant greater power (to set state standards "different from or in addition to" federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes.

Medtronic, 518 U.S. at 504 (Breyer, J. concurring).

Several rationales buttress this conclusion. First, under generic tort law principles, it is presumed that manufacturers will modify their conduct to avoid potential liability, whether that liability arises from common law claims or positive legislative enactments. The development of product liability law is a compelling example of this principle.

Second, when the federal government, through Congress or an administrative or regulatory agency, establishes a comprehensive scheme for the regulation of specific conduct, persons or entities subject to those regulations must be able to understand the legal duties or requirements engendered. Permitting variations, when a federal regulatory or administrative standard has been established, creates confusion and undermines the certainty and efficiency sought by Congress. *See Ouellette*, 479 U.S. at 495-96.

Consequently, because state common law claims establish "standards" which are identical in effect to positive legislative provisions, they can subvert the purpose, intent and methods of the comprehensive, uniform federal regulatory scheme in place. Accordingly, when a successful state common law action would have the effect of establishing a "standard" which would interfere with

or stand as an obstacle to the implementation of a comprehensive federal regulatory plan or the methods adopted to implement that plan or a specific federal regulation, the action must be preempted to avoid inherent inconsistency. *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Ouellette*, 479 U.S. at 494 (concluding that state laws which interfere with the "methods" chosen by Congress to reach a particular goal are preempted); *Taylor v. General Motors Corp.*, 875 F.2d 816, 822, 826 (11th Cir. 1989) (finding that any state common law or legislative provision which interferes or conflicts with a federal regulation is preempted).

3. Federal and State Courts Have Found That Permitting Common Law "No Airbag" Claims Would Have the Effect of Establishing a "Standard" Which Is Contrary To FMVSS 208.

Numerous federal and state courts have recognized that common law "no airbag" claims can either directly or indirectly establish a "standard" which conflicts with the federal "standard" set forth in FMVSS 208 for passenger restraint systems. *E.g., Geier v. American Honda Motor Co., Inc.*, 166 F.2d 1236, 1240 (D.C. Cir. 1999); *Wood v. General Motors Corp.*, 865 F.2d 395, 401, 402, 410 (1st Cir. 1988); *Harris v. Ford Motor Co.*, 110 F.3d 1410, 1413-15 (9th Cir. 1997); *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 n.16 (11th Cir. 1989); *Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989); *Cox v. Baltimore County*, 646 F. Supp. 761, 764 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095, 1096 (E.D. Mo. 1986); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838, 841 (Minn. Ct.

App. 1987); *Miranda v. Fridman*, 647 A.2d 167, 174 (N.J. Sup. Ct. App. Div. 1994); *Cellucci v. General Motors Corp.*, 676 A.2d 253, 258-59 (Pa. Super. 1996); *Dykema v. Volkswagenwerk AG*, 525 N.W.2d 754, 758 (Wis. Ct. App. 1994).

The Ninth Circuit in *Harris* made this explicit, stating:

> [C]ommon law claims can impose requirements equivalent to those written by a state legislature or regulatory agency and consequently can be pre-empted. . . .
>
> [Common law no airbag] claims, if successful would impose massive liability on a [manufacturer] for its decision to install [a federally approved passenger restraint system] rather than airbags. A judgment for [a claimant] would have an effect on [a manufacturer] identical to a state statute or regulation requiring airbags in all vehicles. Furthermore, "a rule of common law which permits the recovery of monetary damages for its breach self-evidently sets a standard."

Harris, 110 F.3d at 1414-15.

The First Circuit employed virtually identical reasoning:

> A state common law action sustaining the theory that a vehicle was defective because it lacked an air bag would, in effect, create a state safety standard related to the same aspect of performance of FMVSS 208 but not identical to FMVSS 208. . . . Allowing a common law action holding manufacturers liable for failing to

> install air bags in motor vehicles would be tantamount to establishing a conflicting safety standard that necessarily encroaches upon the goal of uniformity specifically set forth by Congress in this area.

Wood, 865 F.2d at 402 (emphasis added).

This rationale has also been adopted by state appellate courts. For instance, the Wisconsin Supreme Court has recognized:

> A court decision creating common law liability for the failure to install air bags will effectively force automobile manufacturers to choose the air bag option over other statutorily approved options. An automobile manufacturer faced with the prospect of choosing the air bag option, or facing potential exposure to compensatory and punitive damages for failing to do so, has but one realistic choice. *A court decision that removes the element of choice authorized in occupant crash safety regulations will frustrate the statutory scheme.*

Wickstrom, 416 N.W.2d at 841 (emphasis in original) (citing *Baird v. General Motors Corp.*, 654 F. Supp. 28, 32 (N.D. Ohio 1986)).

Accordingly, the vast majority of appellate courts that have considered this issue have not only found that common law "no airbag" claims are preempted, but they have consistently premised their analysis, in part, upon the fact that common law actions would have the effect of establishing a standard which is not identical to the applicable version of FMVSS 208.

4. Trial Lawyer Organizations, Including ATLA, Have Long Recognized that Common Law Decisions Can Coerce Manufacturers' Behavior as Effectively as Can Legislative Enactments.

Finally, ATLA's current statements that common law decisions do not broadly affect manufacturers' decisions flatly contradict ATLA's and other trial lawyers' publicized and acknowledged strategy to use the common law as a mechanism to force manufacturers to install air bags in their cars, contrary to the federal regulatory scheme.

For example, in 1984 Trial Lawyers for Public Justice organized their "air bag litigation project" to assist trial lawyers in bringing suit against automobile manufacturers for exercising their federally-permitted option to not install air bags in certain cars.[7]

Founder and then Board Member Joan Claybrook initiated the project.[8] The New York Times reported:

> Federal regulators have been arguing for more than a decade about whether Detroit should be forced to equip its cars with air bags, which inflate automatically in crash to protect passengers.
>
> But recently, a small group of trial lawyers from around the nation has quietly developed a new strategy that they hope will move the air bag

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[7] Trial Lawyers for Public Justice 1984 Annual Report.

[8] *Id.*

question out of the regulatory agencies and into the courts.[9]

Joan Claybrook expressly described the coercive strategy behind the project: "We are trying to use economic pressure to force [manufacturers] to offer air bags." *Id.* Clearly, "[t]he strategy is an effort to exploit the existing laws of product liability" to suit the trial lawyers' agenda.[10] The project's materials were available "to plaintiff's attorneys working on airbag cases".[11] One year later Ms. Claybrook extolled the broad implications of individual product liability suits in changing industry practice:

> As so often happens in product liability cases, the public in general can also be a major beneficiary of such individual litigation. If the courts hold the manufacturers liable for refusing to install this technology [or even design in the architecture to facilitate retrofit of air bags for those who want them], then the companies must reassess their stubborn resistance from another perspective, the on that should have guided their thinking from the beginning. They must realize that further stonewalling will incrementally increase their liability. They must begin to consider the needs and interests of their users. That is indeed the purpose of the product liability system.[12]

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[9] Tamar Lewin, *The Air Bag Goes to Court*, N.Y. Times, Oct. 29, 1984, at D1, col.4.

[10] *Id.*

[11] Trial Lawyers for Public Justice 1984 Annual Report.

[12] Joan Claybrook, *Can the Court Persuade Detroit to Sell Air Bags?*, American Bar Association Annual Meeting, Washington D.C., July 9, 1985, p. 17.

Other attorneys have recognized the potential coercive effects of the trial lawyers' strategy. In particular, ATLA contributor Thomas Lambert, Jr. argued in TRIAL magazine:

> It needs to be emphasized that the preventive aim of Tort Law is pervasive and runs like a red thread throughout the entire corpus of Torts. For example, the private Tort litigation system has served, and continues to serve, as an effective and useful therapeutic and prophylactic tool in achieving better health care for our people by discouraging and thereby reducing the incidence of . . . mistakes, mishaps and 'misadventures'.[13]

Another contributor to TRIAL magazine wrote:

> Product liability law fosters injury prevention by creating financial incentive to design safe products . . . The message of larger verdicts for the failure to make air bags available can be loudly heard by automobile manufacturers, and has the potential for being more effective than the attempts to regulate over the past dozen years.[14]

Indeed. Common law actions can be as effective at altering manufactures' behavior as federal regulation, if they are allowed to go forward. Plaintiffs' lawyer organizations, generally, and ATLA, in particular, have known

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[13] Thomas F. Lambert, Jr., *Suing for Safety*, Trial, Annual Products Liability Issue, pp. 48-56 (1983).

[14] Stephen Teret and Edward Downey, *Air Bag Litigation: Promoting Passenger Safety*, Trial, July, 1992, at 93-97.

and promoted this fact for over fifteen years. It is disingenuous to now argue common law actions do not create safety "standards" under the Safety Act.

CONCLUSION

Where federal law and state law conflict, federal law prevails. Because state product liability common law decisions are equal to legislation in coercing manufacturers' behavior or enforcing public policy, these common law decisions can set standards that conflict with federal law. A state product liability action that could result in a finding that a car manufactured in 1987, without airbags is defective conflicts with Federal Motor Vehicle Safety Standard 208, which allowed manufacturers the option to not equip such cars with air bags. As a result the federal law, Standard 208, controls. Such a state common law action is preempted. Any other result upsets the Constitution's heirarchy of laws and the civil justice system's ability to function properly and efficiently. DRI urges the Court to affirm the lower court's decision.

Respectfully submitted,

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IN THE

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ALEXIS GEIER, ET AL.,
Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE BLUE CROSS BLUE SHIELD ASSOCIATION AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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IN THE

Supreme Court of the United States

No. 98-1811

ALEXIS GEIER, ET AL.,
Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE BLUE CROSS BLUE SHIELD ASSOCIATION AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE AMICUS CURIAE

The Blue Cross Blue Shield Association (the "Association") is the national association of local Blue Cross and Blue Shield companies.[1] The local companies provide health insurance and administer health benefits plans to private and public employees and individuals. They are subject to regulation under a variety of federal statutes, including the Employee Retirement Income Security Act (29

[1] In accordance with Rule 37.6, the Association certifies that counsel for a party did not author this brief in whole or in part and that no entity other than the Association, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

U.S.C. § 1001 *et seq.*), the Medicare Act (42 U.S.C. § 303 *et seq.*), the Health Maintenance Organization Act (42 U.S.C. § 300e), the Federal Employees Health Benefits Act (5 U.S.C. §§ 8901-8914), and the Health Insurance Portability and Accountability Act (42 U.S.C. § 1320a-7, *et seq.*). They also operate under the backdrop of extensive state regulation in their respective jurisdictions.

This case concerns the scope of federal preemption doctrine, particularly where a federal statute contains express statements concerning preemption. As entities that are subject to pervasive state and federal regulation, with several of the pertinent federal statutes containing express preemption provisions, the Association's members have an interest in the orderly development of preemption principles and, more specifically, in the consequence ascribed to statutory preemption clauses.

Counsel for the parties have consented to the filing of this brief in letters filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The threshold issue presented in this case is whether the existence of express statements concerning preemption in a federal statute forecloses all inquiry into whether a state measure conflicts with federal purposes such that it is invalid under the Supremacy Clause. The court of appeals held that the presence, in the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act"), 15 U.S.C. §§ 1381-1431, of a preemption provision and what it termed a "savings" provision did not bar an examination of whether state law surviving those provisions might in any event be in conflict with federal law; it then found state law preempted because of a conflict. Petitioners now assert that, "[b]ecause the Safety Act contains both an express preemption provision and an express anti-preemption provision manifesting a

congressional intent not to preempt, any inquiry into implied conflict preemption is precluded." Pet. Br. at 15.

Petitioners' position squarely contradicts the history of preemption law. Traditionally, express and conflict preemption have peacefully coexisted. Express preemption derives from the Court's Commerce Clause cases. In those decisions, the Court, after much deliberation, held that Congress could occupy an entire field of commerce, but only if it clearly manifested an intent to do so. Express preemption is a branch of this power to occupy the field. Where a federal statute contains an express preemption provision or, conversely, a savings clause preserving some sphere of state authority, those provisions serve as an indication of the extent to which (if at all) Congress contemplated state regulation in the particular commercial area.

Conflict preemption analysis emanates not from the terms of the statute, but rather from the Supremacy Clause of the Constitution. The inquiry, rather than focusing on whether Congress has prohibited state regulation entirely in a field, centers on whether state law collides with federal law where the federal statute permits the states to act. If the two collide, the state law must yield under the Supremacy Clause. Recognizing their disparate roots, the Court historically has not linked conflict preemption analysis to examination of an express preemption provision. Instead, the Court has examined whether state law conflicts with Congress's design even if the state regulation withstands scrutiny under the federal statute's express preemption clause. *E.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). The only even arguable departure from that approach was the Court's analysis in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), a decision that the Court has since instructed cannot be read broadly.

Moreover, there is no sound reason, at this late date, for deviating from the Court's historical approach and instead adopting a rule where the existence of an express preemption provision would defeat any conflict preemption claim. If that were the rule, Congress would have to predict all of the likely consequences of its actions and all prospective state responses, for the failure to cover a given situation in the preemption provision would result in automatic acceptance of the state's law. Awkward results would ensue, such as a finding that a federal agency's regulation does not preempt conflicting state law because the statute's preemption section did not state that it applied to state laws inconsistent with federal administrative action.

In this case, the Safety Act's preemption provision simply delineates the field that Congress intended to occupy. Because the preemption provision forbids any state from adopting an automobile safety standard that is not "identical" to a federal standard in effect, 15 U.S.C. § 1392(d), Congress has occupied the field of automobile safety standards, at least where, for example, a state regulator seeks to promulgate a standard applicable to the same equipment or aspect of performance addressed by the federal government. The so-called "savings" clause does not appear to relate to state and federal authority at all, since it merely establishes certain defenses that cannot be proffered in court litigation. In any event, whatever the specific meaning of these provisions, they are no barrier to conflict preemption. Having found that there remained an area where state action was not altogether foreclosed, the court of appeals acted fully in accord with this Court's precedents in determining that it could then conduct a conflict preemption analysis.

ARGUMENT

ONLY A RULE FAVORING THE COEXISTENCE OF EXPRESS AND CONFLICT PREEMPTION IS COMPATIBLE WITH THE HISTORY OF THE PREEMPTION DOCTRINE

A. Express Preemption Derives from the Court's Commerce Clause Jurisprudence

The preemption doctrine has its roots not in the Constitution's Supremacy Clause, but in the Commerce Clause. During the early years of the nation, the Court wrestled with the question whether the states were permitted to act in the field of interstate commerce. Initially, at least some justices took the view that the states were entirely incapacitated in any legislative matter touching on interstate commerce. *City of New York v. Miln*, 36 U.S. 102, 121 (1837) (Story, J., dissenting). That view never garnered the Court's full support; nonetheless, by 1852, in the landmark decision in *Cooley v. Board of Wardens*, 53 U.S. 299 (1852), the Court concluded that, at least in some commercial fields, state law was inoperative. Those subjects that "are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Id.* at 319; *accord Welton v. Missouri*, 91 U.S. 275, 280 (1875); *Henderson v. Mayor of New York*, 92 U.S. 259, 272-73 (1876).

In the aftermath of *Cooley*, the Court developed a related principle: that even in areas that were not so national in orientation as to be altogether beyond the states' reach, state activity in those areas was forbidden once Congress "act[ed] with reference to them." *Welton*, 91 U.S. at 280. This corollary gained momentum as the 1900's began, with the Court repeatedly holding that, "if the State and Congress

have a concurrent power, that of the State is superseded when the power of Congress is exercised." *Southern Ry. Co. v. Reid*, 222 U.S. 424, 436, 442 (1912). "One authority must be paramount, and when it speaks the other must be silent." *Id.*; *accord Missouri, Kan. & Tex. Ry. Co. v. Haber*, 169 U.S. 613 (1898); *Second Employers' Liability Cases*, 223 U.S. 1, 55 (1912); *Savage v. Jones*, 225 U.S. 501, 533 (1912); *Chicago, Rock Island & Pac. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U.S. 426, 435 (1913). As Justice Holmes put it, "[w]hen Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915).

In these turn-of-the-century decisions lie the seeds of the preemption doctrine. The preemption doctrine, at its inception, focused entirely on whether Congress had "occup[ied] the field." *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613 (1926); *see also Savage*, 225 U.S. at 533 (using similar language); *Chicago, Rock Island. & Pac. Ry. Co.*, 226 U.S. at 435 (same). Because the rule, at that point, was that Congressional "action, when exerted, covers the whole field and renders the State impotent to deal with a subject," the central task was to determine the extent of the field that Congress had decided to occupy. *Chicago, Rock Island & Pac. Ry. Co.*, 226 U.S. at 435. Once the scope of the field was delineated, all state laws in that area were ousted. Indeed, the word preemption means, first and foremost, "to acquire" or "to seize upon to the exclusion of others," *Webster's Ninth New Collegiate Dictionary* 927 (1983), and Congress now was said – in what appears to be the Court's first use of the word – to have "preempted" a field when it legislated in that domain. *New York Cent. R.R.*

Co. v. Winfield, 244 U.S. 147, 169 (1917) (Brandeis, J., dissenting).

As sentiment changed towards greater state sovereignty, the Court repudiated earlier precedent, adopting a standard against the automatic ouster of all state laws in fields that Congress had touched. Instead, the guiding "assumption" became – and remains to this day – "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947); *accord Mintz v. Baldwin*, 289 U.S. 346, 350 (1933); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1977). Thus, the preemption inquiry shifted from determining the scope of the field that Congress intended to occupy (with that occupation then assumed to be exclusive) to ascertaining whether Congress in any manner intended exclusively to occupy the field. Typically, the appropriate question is whether "Congress has 'unmistakably . . . ordained' . . . that its enactments alone are to regulate a part of commerce," so that "state laws regulating that aspect of commerce must fall." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Florida Lime & Avocado Growers*, 373 U.S. at 142).

Because the focus had shifted to Congressional intent, preemption provisions and savings clauses now began to proliferate in legislation. *E.g.*, Communication Act of 1934, 47 U.S.C. §§ 151, 152(b) (enacted in 1934); Federal Food, Drug, and Cosmetic Act of 1938, 21 U.S.C. § 360(k) (enacted in 1938); Atomic Energy Act, 42 U.S.C. § 2021 (enacted in 1959); Employee Retirement Income Security Act, 29 U.S.C. § 1144 (enacted in 1974). While an objective to occupy a field to the exclusion of the states might be implied simply from "a complete scheme of regulation," *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941), Congress

often sought to make its will expressly known through legislative language addressing the states' authority. Hence, at this juncture, the notion of "express preemption" surfaced: to determine whether Congress intended exclusively to occupy an area, the Court would examine "whether Congress has either *explicitly* or implicitly declared that the States are prohibited from regulating." *Ray*, 435 U.S. at 157 (emphasis added).

The critical point is that the traditional preemption doctrine, including express preemption, was tied to the question whether Congress, in exercising its Commerce Clause authority, intended to occupy a field of commercial regulation, thereby annulling all state measures. A preemption provision helps define the answer, because its terms mark the extent of federal involvement or the range of state activity anticipated and permitted by Congress.[2]

B. Conflict Preemption Has Its Origin in the Supremacy Clause

Quite apart from the preemption doctrine under the Commerce Clause, the Court has long recognized the principle that state law must surrender to federal law where the two conflict. That principle derives from the Supremacy Clause, which provides that the "Constitution, and the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. *See generally* Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 770, 809 (1994).

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[2] While the preemption doctrine developed through the Court's Commerce Clause cases, it is not limited to Congress's actions under its power to regulate interstate commerce. Congress can equally occupy specific fields of regulation (whether expressly or implicitly) in exercising authority under any of its enumerated powers.

Chief Justice Marshall first delineated the parameters of the Supremacy Clause, writing for the Court in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824), that state laws, "though enacted in the exercise of powers not controverted, must yield" if they "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution." *See also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405-06 (1819). In the time since *Gibbons*, the Court has recognized several ways in which state law might "interfere with" federal law and therefore must, under the Supremacy Clause, give way:

> [F]ederal law may be in "irreconcilable conflict" with state law. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). Compliance with both statutes, for example, may be a "physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); or, the state law may "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Barnett Bank of Marion County, N. A. v. Nelson, 517 U.S. 25, 31 (1996).

Until recently, the Court had not referred to the notion that federal law overrides conflicting state law as "preemption" at all. Even after the Court began employing the term "preemption" to denote areas where Congress (under the Commerce Clause) had prohibited all state regulation, the Court carefully avoided use of the term "preemption" when discussing whether state and federal law clashed, instead putting its analysis in terms of whether the "result is impermissible, and the state law must yield to the federal." *Jones v. Rath Packing Co.*, 430 U.S. 519, 543 (1977); *accord Perez v. Campbell*, 402 U.S. 637, 652 (1971)

(the "controlling principle" is that "any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause"); *see also DeCanas v. Bica*, 424 U.S. 351, 357 n.5 (1976). For that matter, the term "preemption" is somewhat of a misnomer to describe situations where state law is inoperative due to a conflict with federal law, since the area has not been "acquired" to the exclusion of the states. *See supra* p. 6; Gardbaum, *supra*, at 769-70, 808-09. Still, for better or worse, the Court's most recent precedents have used the shorthand "conflict preemption" to refer to the Supremacy Clause analysis. *E.g.*, *Medtronic v. Lohr*, 518 U.S. 470, 503 (1996); *Boggs v. Boggs*, 520 U.S. 833, 844 (1997).

Congressional intent historically has played a different role in the Court's Supremacy Clause cases than under the preemption doctrine (as developed under the Commerce Clause). Whereas Congress must clearly have evinced an intent to occupy an entire field of regulation to the states' exclusion, the Court has invalidated state laws that conflict with federal law regardless of whether Congress, in the federal statute, specifically manifested an intent to preempt contrary state law. *E.g.*, *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 470-78 (1984); *Perez v. Campbell*, 402 U.S. 637, 648 (1971); *Hill v. Florida*, 325 U.S. 538, 541-43 (1945). That is because the language of the Supremacy Clause is self-executing, itself making federal law supreme notwithstanding "any Thing in the . . . Laws of any State to the Contrary."

This is not to say that Congressional intent is irrelevant in a conflict preemption case. Congressional intent remains "'the ultimate touchstone.'" *Wisconsin Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 290 (1986) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). The intent that matters, however, is Congress's *substantive* objective with

respect to the federal statute at issue, not the presence of a specific Congressional statement concerning the invalidity of conflicting state law. If state law "is inconsistent with the structure and purpose of the [federal] statute as a whole," *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992), or would "frustrate its objects," *Boggs*, 520 U.S. at 841, it must fall under the Supremacy Clause.

Because conflict preemption is not dependent on specific Congressional intent concerning the validity of state laws, it historically has never hinged on the presence or absence of an express preemption provision. The test under the Supremacy Clause is "'essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.'" *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Perez*, 402 U.S. at 644). If, after that process, the state law is found in collision with the federal statute, it "is rendered invalid by the Supremacy Clause," irrespective of whether Congress expressly spoke to the issue of displacement of state law. *Perez*, 402 U.S. at 652.

C. Express and Conflict Preemption Have Historically Coexisted, Notwithstanding the *Cipollone* Decision

Express preemption and conflict preemption, then, stem from different constitutional sources – the former from the Commerce Clause, the latter from the Supremacy Clause. Until very recently, there was no question that the two coexisted and thus that there could be conflict preemption, even where the federal statute contained an express preemption provision that did not in the specific circumstances apply. The Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), carefully delineates the traditional approach.

The Court there initially outlined the preemption doctrine. "The first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S. Const., Art. 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case." *Jones*, 430 U.S. at 525. The Court began with a presumption against finding federal exclusivity, but added that a complete ouster of the states from "the field" would occur where Congress had so "compelled." *Id.* And that result could occur "whether Congress' command is explicitly stated in the statute's language," such as through an express preemption provision, "or implicitly contained in its structure and purpose." *Id.*

After noting that initial inquiry, the Court then turned to the Supremacy Clause (and abandoned the term "preemption"). "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI." *Jones*, 430 U.S. at 525-26. On this front, the Court's "task is 'to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." *Jones*, 430 U.S. at 526; *accord Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983) (treating separately concepts of occupation-of-the-field and conflict preemption); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947) (noting that the "perplexing question [is] whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide").

Accordingly, as historically understood, there were two kinds of preemption – occupation-of-the-field preemption and conflict preemption (the latter not being "preemption" in its literal sense). An express preemption provision bore solely on the first category of preemption, for it assisted the Court in discerning whether Congress had sought to make the subject matter an exclusive federal domain or whether Congress intended to leave room for the states; at the same time, Congress's occupation of the area could also be implied from the statute's overall comprehensiveness and structure. Conflict preemption focused only on the question whether, in a field where Congress had evinced no intent to oust the states completely, state law in the particular case nevertheless frustrated Congress's purposes. An express preemption provision did not pertain to this latter issue; nor did an express preemption provision's inapplicability bear on the conflict preemption inquiry. In fact, in the *Jones* case itself, the Court found that an express preemption provision in the relevant federal statute did *not* foreclose the state's law. But the Court then struck down the state law because it "would prevent 'the accomplishment and execution of the full purposes and objective of Congress' in passing the [federal statute].'" *Jones*, 430 U.S. at 543 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S 133, 139 (1990) (holding that, even if the state law survived ERISA's express preemption provision, it must be struck down as in conflict with an existing federal cause of action).[3]

[3] Some of the Court's decisions speak of three categories of preemption: express, occupation-of-the-field, and conflict. *E.g.*, *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). That categorization does not quite hit the mark. For instance, it is not correct to separate express and field preemption, since an express preemption provision can establish the parameters of the field that is (or is not) occupied. On a related issue, the court of appeals referred to its conflict preemption analysis as "implied" preemption. That is technically true, since conflict preemption is always *inferred* from the statute's terms, purposes, and structure. But occupation-of-the-field preemption is also sometimes termed "implied" preemption, since an intent to occupy the area can be implied from a

That is where things stood, until *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). In that case, the Court, for the first time, arguably suggested that the inapplicability of an express preemption provision might foreclose further inquiry into whether, under the Supremacy Clause, state law posed an obstacle to federal objectives. The Court said:

> In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S. [497, 505 (1978)], "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282, 93 L. Ed. 2d 613, 107 S. Ct. 683 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of expressio unius est exclusio alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.

Cipollone, 505 U.S. at 517; *see also id.* at 532 (Blackmun, J., concurring) ("We resort to principles of implied pre-

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comprehensive or pervasive statutory scheme rather than express statutory terms. *See id.* In light of these esoteric matters, it may be best to refer to two categories – occupation-of-the-field and conflict – with the former having two subcategories (express and implied). That division likewise establishes the doctrinal divide based on the portion of preemption analysis that originates in the Commerce Clause (occupation-of-the-field) and that which stems solely from the Supremacy Clause (conflict).

emption – that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law – only when Congress has been silent with respect to pre-emption.") (internal citation omitted). *But see id.* at 547 (Scalia, J., dissenting) ("we have never expressed such a rule before, and our prior cases are inconsistent with it," and then citing the *Jones* case).

Almost immediately after *Cipollone*, and as litigants sought to use the decision to support a revolutionary rule against conflict preemption (as Petitioners seek to do here), the Court addressed the confusion. In *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288, 289 (1995), the Court held that *Cipollone* did not establish "a categorical rule precluding the coexistence of express and implied pre-emption"; "[a]t best *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule." Then, in *Boggs v. Boggs*, 520 U.S. 833, 844 (1997), the Court bypassed entirely ERISA's express preemption provision, 29 U.S.C. § 1144, and held that "[w]e can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects." Other recent decisions likewise assume the coexistence of express and conflict preemption. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 503 (1996) (holding that scope of express preemption "may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis"); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (noting that courts should turn to conflict preemption if "explicit pre-emption language . . . does not directly answer the question").

In the long history of the preemption doctrine, therefore, *Cipollone* stands alone. If read as Petitioners assert, it, unlike any decision before it or since, deemed a statutory preemption provision as not just an expression of Congress's

will concerning whether the federal government would occupy exclusively a field of commerce, but conceivably also as a limit on Supremacy Clause analysis.

Even the more diluted statement in *Myrick* that an express preemption provision establishes an "inference" regarding the full scope of preemption is problematic. Traditionally, Congress's intent (whether express or implied) as to prohibiting state regulation in a field had no relation to the separate and distinct issue whether state law, in an individual case, stood as an obstacle to federal legislation. Put simply, a rule that conflict preemption cannot occur if a statute contains an express preemption provision – *i.e.*, the position Petitioners say was adopted in *Cipollone* – has no grounding in constitutional history and blurs a long-settled distinction between doctrines emanating from different constitutional bases.

D. There Is No Sound Reason for Departing, at this Late Date, from the Historical Rule

Given that the rule of coexistence is deeply ingrained in this Court's precedents, it should take, at a minimum, compelling reasons to jettison it. No such reasons exist. To the contrary, recognition of a bar to conflict preemption where a statute contains an express preemption clause could create enormous difficulties and awkward results.

1. Rejection of the traditional understanding concerning occupation-of-the-field preemption (including its express-preemption branch) and conflict preemption would wreak legislative havoc. Congress has adopted all of the express preemption language contained in the U.S. Code against the backdrop that, regardless of its actions, state law will not stand if, in a particular context, it conflicts with federal law. Were the Court to take that safety valve away, Congress

would be forced to re-legislate in many areas now to provide specifically for the invalidation of conflicting state law.

"Stare decisis has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (quoting *Hilton v. South Carolina Public Ry. Comm'n*, 502 U.S. 197, 202 (1991)). In this case, the Court should abide by its long-held view that express and conflict preemption can coexist, because "Congress has legislated with an expectation that [that] principle will apply." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

2. Were the Court to shift toward a preemption regime like the one Petitioners claim the Court espoused in *Cipollone*, Congress – if it wished to enact a law containing a preemption provision – would be placed in the impossible position of seeking to prophesy all of the potential ramifications of that new law. For once Congress enacted a preemption clause, any state action beyond its explicit scope would survive, even though the federal statute's structure or purpose might be undermined. Thus, Congress would be left to contemplate each and every law a state might pass and its effect on the federal legislative purpose, so as to ensure that the matter is addressed in the preemption provision. Under Petitioners' reading of *Cipollone*, "[t]he statute that says anything about pre-emption must say everything." *Cipollone*, 505 U.S. at 548 (Scalia, J., dissenting). "If this is to be the law, surely only the most sporting of Congresses will dare to say anything about pre-emption." *Id.*

It is unreasonable to expect Congress to be perfectly clairvoyant. "Congress, embroiled in controversy over policy issues, rarely anticipates the possible ramifications of

its acts upon state law." Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 Stan L. Rev. 208, 209 (1959). Rather than burden Congress with the task of defining with "great exactitude" all of its preemption objectives, *Cipollone*, 505 U.S. at 548 (Scalia, J., dissenting), the better approach is simply to leave in place the historical rule that, whatever Congress might say expressly about prohibiting or allowing state regulation in the area, the Supremacy Clause stands ready to strike down state law that ultimately upsets federal goals.

3. A rule that conflict preemption is forbidden where a statute contains an express preemption provision would create anomalous results. "If taken seriously, it would mean, for example, that if a federal consumer protection law provided that no state agency or court shall assert jurisdiction under state law over any workplace safety issue with respect to which a federal standard is in effect, then a state agency operating under a law dealing with a subject other than workplace safety (e.g., consumer protection) could impose requirements entirely contrary to federal law – forbidding, for example, the use of certain safety equipment that federal law requires." *Cipollone*, 505 U.S. at 547 (Scalia, J., dissenting). By limiting the prohibition on state court jurisdiction to state work safety laws, Congress unwittingly would have permitted the states to undermine federal objectives through state measures not focused upon work safety.

The results also would be particularly "mischievous," *see id.*, where Congress has enacted a preemption provision and at the same time has delegated authority to a federal agency. Congress may have determined that state laws in a particular area should not be altogether ousted; at the same time, the federal agency, exercising its lawful authority, may have promulgated regulations in the area. Were state law to conflict with the federal regulation, the state statute would

stand, since local regulation was allowable under the preemption clause. The only way to stop the state assault on the federal administrator's activity would be for Congress to use magic words in the preemption section that also would permit federal regulations to preempt conflicting state laws. That federal regulations supersede inconsistent state measures is already a fundamental tenet of Supremacy Clause doctrine. *See Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-154 (1982). Congress, however, would need to enact the principle into every statutory scheme where it has adopted a preemption provision, if it wants the principle to have continued life.

For all of these reasons, the Court should reject a rule that the applicability of an express preemption provision forecloses conflict preemption. The Court should adhere to its traditional approach that a Supremacy Clause analysis may occur, even if a statute contains an express preemption provision that "does not directly answer the question." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996).

E. The Preemption Provision and the So-Called Savings Clause at Issue in this Case Should Not Prohibit the Court from Undertaking a Conflict Preemption Analysis

The court of appeals in this case correctly noted that the presence in the Safety Act of an express preemption provision and what it termed a "savings" clause should not foreclose a conflict preemption analysis. The Safety Act's preemption provision provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in

> effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d). The Safety Act also states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." *Id.* § 1397(k).

Consistent with the historical underpinnings of the preemption doctrine, the Safety Act's preemption provision delineates the field that Congress sought to occupy. It indicates that Congress may have endeavored to occupy the field of safety standard regulation to the exclusion of the states, such that a state regulatory agency or legislature, for instance, would be barred from imposing safety standards at the manufacturing stage in their states. Section 1397(k), in turn, does not appear to address any matter of state-federal relations at all, focusing instead on the sorts of defenses that are or are not available in court suits.

Whatever the proper reading of these provisions, the court of appeals – in light of the historical development of the preemption doctrine – was free to determine whether, in an area where the states were not prohibited altogether from acting, the state action would still conflict with Congress's (or the National Highway Traffic Safety Administration's) objectives.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

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IN THE
Supreme Court of the United States

ALEXIS GEIER, *et. al.*,

Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 98-1811

ALEXIS GEIER, *et. al.*,
Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a Washington, D.C.-based nonprofit public interest law and policy center with supporters in all 50 states.[1] WLF devotes substantial resources to defending and promoting free enter-

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[1] Pursuant to S. Ct. R. 37.6, WLF hereby affirms that no counsel for either party authored any part of this brief, and that no person or entity, other than WLF, its supporters, and its counsel, made a monetary contribution to the preparation or submission of this brief.

prise, individual rights, and a limited and accountable government.

To that end, WLF has appeared before this and other state and federal courts in cases involving preemption issues, seeking to point out the economic inefficiencies created when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1996); *International Assoc. of Independent Tanker Owners v. Locke,* No. 98-1706 (dec. pending).

WLF is particularly concerned that the American economy suffers, and public safety or health can be jeopardized, when state law, including state tort law, imposes upon industry an unnecessary layer of regulation that obstructs or frustrates the objectives or operation of specific federal regulatory programs, such as the National Traffic and Motor Vehicle Safety Act ("Safety Act") at issue here.

WLF supports each of the arguments raised by Respondents in their brief. WLF is filing separately in order to focus on arguments raised in the Brief *Amicus Curiae* of Robert B. Leflar, Robert S. Adler, Michael Green, and Joseph A. Page (the "Leflar Brief"). WLF strongly disagrees with the Leflar Brief's proposal that the Court's long-standing preemption jurisprudence be overturned and replaced with a regime under which implied conflict preemption would be "narrowly circumscribed." Leflar Br. 6. WLF submits this brief in support of Respondents with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of judicial economy, WLF hereby incorporates by reference the Statement of the Case contained in Respondents' Brief.

In brief, Petitioner Alexis Geier was injured while driving a 1987 Honda Accord -- which did not have an airbag -- when it crashed into a tree. Petition Appendix ("Pet. App.") 2. She filed suit against Respondents American Honda Motor Company, *et al.* ("Honda"), alleging that the car was defectively designed because it did not include an airbag. *Id.*

The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's grant of summary judgment to Honda, finding that Geier's design defect claims were impliedly preempted by federal law. Pet. App. 1-16. The appeals court held that allowing those claims to continue would conflict with federal law by frustrating the implementation of specific passive restraint system policies adopted by the National Highway Traffic Safety Administration ("NHTSA") pursuant to the Safety Act. *Id.* at 15-16.

Geier thereafter filed a petition for a writ of certiorari, noting that while the decision of the appeals court was consistent with the decisions of other federal appeals courts, it conflicted with the decisions of several state supreme courts on this precise preemption issue. The Court granted the petition on September 10, 1999.

SUMMARY OF ARGUMENT

Preemption of state tort law is ultimately an issue of congressional intent. Once Congress's preemptive intent has been identified, it is not the role of the courts to construe preemption provisions broadly or narrowly, based (for example) on the types of policy considerations identified in the Leflar Brief. Because (as demonstrated by Honda in its brief) tort suits based on "no airbag" claims stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, such suits are preempted by operation of the Supremacy Clause of the Constitution.

In any event, the policy arguments raised in the Leflar Brief are not well-founded. The authors of the Leflar Brief assert that a finding of preemption in this or similar cases would undermine the viability of state tort law. But that assertion overlooks the narrowness of the preemption argument being made by Honda in this case. Honda limits its argument to those few cases (as here) in which allowing tort suits to go forward would conflict with motor vehicle safety standards adopted by NHTSA. For example, Honda does not allege that federal law preempts claims that installed airbags were defectively designed, because no NHTSA standard grants manufacturers the option of adopting a particular airbag design.

Nor is there any merit to the Leflar Brief's contention that common-law tort suits can address product liability concerns more efficiently and fairly than can federal administrative action. Indeed, the available evidence suggests just the opposite: federal administrative agencies can resolve safety issues more swiftly and have resources

available to them (including, *e.g.*, expertise, experience, information-gathering powers, national perspective, and funding) that dwarf the resources available to any trial factfinder. The Leflar Brief also asserts that common-law tort actions serve interests not served by federal regulatory programs -- in particular, compensation of the injured. But to the extent that such actions interfere with federal policy on airbag installation, preemption is clearly mandated under existing case law, regardless whether the actions serve interests distinct from those served by the federal programs.

Finally, there is no basis for the Leflar Brief's argument that implied conflict preemption should be limited to those cases in which a federal agency has conducted notice-and-comment proceedings and has affirmatively concluded that preemption is warranted. The argument overlooks a key aspect of federal preemption: it is Congress and the operation of the Supremacy Clause that determine the preemptive scope of federal law. Once NHTSA has established a federal motor vehicle safety standard, it is not NHTSA's role to determine whether to permit states to enforce laws that conflict with that standard.

ARGUMENT

I. PREEMPTION OF STATE TORT LAW IS ULTIMATELY AN ISSUE OF CONGRESSIONAL INTENT, AND AN INTENT TO PREEMPT GEIER'S ACTION CAN BE INFERRED HERE

Whether the federal government has preempted an assertion of regulatory authority by state or local governments in a given instance is ultimately an issue of the intent of Congress and the operation of the Supremacy Clause. As

this Court has repeatedly emphasized, "Pre-emption fundamentally is a question of congressional intent . . . ." *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990). *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) ("'[t]he purpose of Congress is the ultimate touchstone' of preemption analysis") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486-87 (1996) ("any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose.*'") (emphasis in original) (quoting *Cipollone*, 505 U.S. at 530 n.27 (opinion of Stevens, J.)).

In other words, it is the role of Congress, not a court, to define how broad or narrow a federal statute's preemptive reach should be. Of course, the courts look to a variety of sources[2] and employ a variety of interpretive techniques in attempting to discern what Congress intended. But once Congress's preemptive intent has been identified, it is not the role of the courts to construe preemption provisions broadly or narrowly, based (for example) on the types of policy considerations identified in the Leflar Brief. A court's "task in all pre-emption cases is to enforce the 'clear and manifest purpose of Congress.'" *Gade*, 505 U.S. at 111 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Rice v. Santa Fe Elevator Corp.*, 331

[2] "Congress' intent, or course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic*, 518 U.S. at 486 (quoting *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in the judgment)).

U.S. 218, 230 (1947)). That is exactly what the D.C. Circuit did here.[3]

Congress's intent to preempt state and local law may be explicitly stated in its statutory language or implicitly contained in the statute's structure or purpose. *Cipollone*, 505 U.S. at 516. State law is impliedly preempted if: (1) it actually conflicts with federal law; or (2) federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* (citations omitted). State law "actually conflicts" with federal law "*either* because compliance with both federal law and state regulations is a physical impossibility, *or* because the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987) (emphasis added and internal quotations omitted).

The D.C. Circuit held that Petitioners' tort action is barred under the second prong of conflict preemption -- that is, the tort action "stands as an obstacle to the

[3] In Robert B. Leflar & Robert S. Adler, *The Preemption Pentad: Federal Preemption of Products Liability Claims After Medtronic*, 64 Tenn. L. Rev. 691, 694-95 (1997), two of the authors of the Leflar Brief denigrate this Court's repeated emphasis on the importance of congressional intent in analyzing preemption issues. They refer to it as a "mantra" -- "a formulaic incantation of black-letter law" that "[e]very court addressing a preemption recites." *Id.* at 694. WLF respectfully disagrees. It is beyond dispute that when Congress chooses to preempt state and local regulation of commerce, it is entitled to do so under the Supremacy Clause. U.S. Const., art. VI, cl. 2; *Cipollone*, 505 U.S. at 516. Accordingly, courts have *no* legitimate basis upon which to determine preemption issues other than by examining congressional intent.

accomplishment and execution of the full purposes and objectives of Congress." Pet. App. 13-14. The appeals court held that "allowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department [of Transportation's] policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems," *id.* at 15, and that Congress (through the Safety Act) had authorized the Department to adopt such policies. *Id.* at 2. Honda's brief thoroughly explains why Petitioners' action would (if allowed to go forward) "frustrate" federal policy, and thus WLF will not repeat that explanation here.

The Leflar Brief does not seriously dispute the appeals court's "frustrat[ion]" finding. Rather, it advances several policy arguments in support of its contention that the bar should be raised for defendants asserting that state tort actions filed against them are preempted.[4] Those policy

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[4] The Leflar Brief asserts:

> Reasonable minds may differ on the merits of NHTSA's choice of method. The question before the Court is not whether NHTSA's phase-in strategy was justified. It is whether damage awards would *seriously disrupt* the federal regulatory program. The Court of Appeals failed to address this question.

Leflar Brief 16 (emphasis added).

For the past 60 years, however, the applicable test, often repeated by this Court, has been whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (citing *Savage v. Jones*, 225 U.S. 501, 533 (1912)). It appears that Prof. Leflar, *et al.*, in their efforts to narrowly circumscribe implied conflict preemption, simply have invented their own test, which would preclude preemption even

(continued...)

arguments are not well-founded. More importantly, those arguments simply are not relevant to the issue before the Court: whether it can reasonably be inferred that Congress intended to preempt torts actions such as Petitioners'.

II. A FINDING OF PREEMPTION UNDER THE NARROW CIRCUMSTANCES OF THIS CASE DOES NOT UNDERMINE THE VIABILITY OF STATE TORT LAW

The Leflar Brief's assertion that "implied preemption in products liability cases should be narrowly circumscribed" (Leflar Br. 6) is premised on the authors' view that a finding of preemption in this or similar cases would undermine the viability of state tort law. They assert that "a narrowly cabined implied preemption doctrine" is necessary to "allow[] for the *coexistence* of federal administrative regulation and state tort law." *Id.* (emphasis added). They assert, "Congress assumed the *continued existence* of state tort law" when it enacted consumer protection laws in the 1960s and 1970s, and "*[p]ermitting this traditional tort regime to continue* can partially ameliorate various limitations of administrative agencies." *Id.* (emphasis added).

The Leflar Brief is starting from a faulty premise: its authors are simply incorrect in assuming that a finding that Petitioners' tort claims are preempted would in some way undermine the "traditional tort regime." To the contrary, the appeals court's holding has no effect on many other types of potential design-defect claims that could be asserted

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[4](...continued)
where, as the court of appeals found here, state law would frustrate a federal agency's *full* implementation of a federal statute.

against automobile manufacturers, because it is not often true that such claims stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Indeed, while the federal appeals courts are in agreement that "no airbag" claims (such as those raised by Petitioners) are preempted by the Safety Act, they have only rarely found conflict preemption with respect to other types of product liability claims involving airbag safety. For example, in *Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992), the Fifth Circuit rejected a defense that the Safety Act preempted a claim that an air bag was defectively designed. The manufacturer had elected to install an airbag in the plaintiff's car; the plaintiff alleged that the airbag was defective because it failed to perform in a manner that the plaintiff thought reasonable. The Fifth Circuit held that allowing the claim to go forward would not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, because Congress and NHTSA (when it adopted Standard 208, the same motor vehicle safety standard at issue in this case) did *not* grant a "safe harbor" to manufacturers that would allow them to design airbags that met but did not exceed federal safety standards. *Perry*, 957 F.2d at 1265. The court explained that allowing tort liability based on defective airbag design "would not remove or require any particular choice, or otherwise frustrate 'flexibility' that the federal scheme provides." *Id.*

In contrast, Honda has convincingly demonstrated that permitting Petitioners' claims to go forward *would* frustrate federal policy by denying to manufacturers an option (not installing airbags in all cars) expressly granted them by

Standard 208. Moreover, NHTSA established that policy in furtherance of the Safety Act's goal of maximizing automobile safety.[5] The "traditional tort regime" is in no way undermined by preempting tort actions in those unusual situations where (as here) the federal government has determined that overall public safety is enhanced if use of unproven safety devices is phased in over a period of years.

The Leflar Brief's assertion -- that preemption of tort claims must be narrowly confined in order to prevent the "traditional tort regime" from being undermined -- is belied by the history of this Court's treatment of such preemption claims. The Court has not adopted any overarching presumptions regarding whether state tort claims should or should not be deemed preempted by federal laws that do not state explicitly whether such claims are to be preempted. Rather, the Court has adopted a case-by-case approach that examines whether, in light of the federal statutory framework, Congress should be deemed to have preempted each of the plaintiff's causes of action. That case-by-case approach is well illustrated by *Cipollone*, where the Court emphasized, "We must look to each of petitioner's common-law claims to determine whether it is, in fact, preempted." *Cipollone*, 505 U.S. at 523 (plurality opinion). After examining Congress's purposes in adopting the Public Health Cigarette Smoking Act of 1969, the Court determined that the 1969 Act preempted the plaintiff's common-law claims based on failure to warn but not those claims based on express warranty, fraudulent

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[5] For example, federal officials determined that a policy of phasing in airbags, rather than mandating their immediate installation, would maximize safety by encouraging "innovation in occupant-protection systems." *See* 49 Fed. Reg. 28962, 29001 (July 17, 1984).

misrepresentation, or conspiracy. *Id.* at 530-31 (plurality opinion); *id.* at 554 (Scalia, J., concurring in the judgment in part and dissenting in part). Similarly, the Court in *Medtronic* did not base its holding on any all-encompassing theory regarding the propriety of preempting common-law tort actions; rather, the Court engaged in a claim-by-claim analysis of whether Congress had intended to preempt the plaintiffs' negligent design, negligent manufacture, and failure-to-warn claims. *Medtronic,* 518 U.S. at 492-502.

The Court has, on a number of occasions, held that common-law tort actions are preempted by the federal statute at issue.[6] Yet despite these holdings, it cannot

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[6] *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) (preemption of negligence claim that a conductor operated a train at an excessive speed); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (preemption of failure-to-warn claim and certain fraudulent misrepresentation claims pertaining to adequacy of warnings regarding dangers of cigarette smoking); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (preemption of employee's state law wrongful discharge claim based upon employer's alleged attempt to avoid payment into a pension plan); *United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362 (1990) (preemption of claims that union negligently conducted mine safety inspections in a wrongful death action); *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988) (preemption of state law that held government contractors liable for design defects in military equipment under certain circumstances); *International Brotherhood of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851 (1987) (preemption of state law tort claim that a union breached its duty of care to provide a union member with a safe workplace); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (preemption of tort claims arising from employer's insurer's termination of disability benefits); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (implied preemption of common-law nuisance claims which could interfere with operation of federal environmental program); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) (preemption of state-law tort claim involving bad-faith handling of an insurance claim); *San Diego Bldg.*

(continued...)

seriously be contended that the common-law tort system has been undermined or that tort suits no longer are an effective means of providing compensation to those wrongfully injured. Rather, the cited cases are simply a reflection of Congress' decision, in a limited number of instances, to bar tort suits that threaten to interfere with the accomplishment and execution of the full purposes and objectives of Congress. Similarly, given the Leflar Brief's concession that Congress and NHTSA's purposes and objectives included "a phase-in strategy" for airbag installation (Leflar Br. at 16), there can be no justification for permitting a common-law tort suit that would conflict with that phase-in strategy. But given the limited nature of Honda's preemption claim, a holding that Petitioners' tort suit is preempted will not undermine "the traditional tort regime."

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[6](...continued)
Trades Council v. Garmon, 359 U.S. 236 (1959) (preemption of damages claim based on union picketing). Indeed, the RESTATEMENT (THIRD) OF TORTS (1998) recognizes that federal law can preempt tort claims:

> [I]n federal preemption, the court decides as a matter of federal law that the relevant federal statute or regulation reflects, expressly or impliedly, the intent of Congress to displace state law, *including state tort law*, with the federal statute or regulation. . . . Judicial deference to federal product safety statutes or regulations occurs . . . because, when a federal statute or regulation is preemptive, the Constitution mandates federal supremacy.

RESTATEMENT, § 4 cmt. e (emphasis added).

III. THE CONTENTION THAT PRODUCT SAFETY IS MORE FAIRLY DEALT WITH THROUGH COMMON-LAW ACTIONS THAN THROUGH FEDERAL ADMINISTRATIVE ACTION IS MERITLESS, IN ADDITION TO BEING IRRELEVANT

The Leflar Brief cites several "prudential considerations" in support of its contention that implied preemption of common-law actions be given a "narrow scope." Leflar Br. 12. Chief among those considerations is the authors' claim that state tort systems are less susceptible to political corruption than are federal administrative agencies. They assert:

> Federal agencies such as NHTSA suffer from various limitations in carrying out their charges, limitations which the coexistence of the tort system can partially ameliorate. One such limitation arises from agencies' susceptibility to political pressure, as the tortured history of airbag regulation demonstrates all too well. . . . Agencies may issue and then withdraw safety standards depending on the political winds, but if the tort system is in place the steady pressure of potential liability will provide a constant background incentive for the achievement of reasonable safety.

Leflar Br. 12-13.

There is simply no empirical evidence to support the Leflar Brief's contention. Indeed, what evidence there is points in precisely the opposite direction. For example, state courts, where much products liability litigation is brought, are themselves subject to considerable political

influences -- primarily because "[p]opular election and retention of state judges have been integral components of the American legal and political systems since the early nineteenth century." Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 Harv. C.R.-C.L. L. Rev. 187 (1996); *see also* Robert A. Carp and Ronald Stidham, Judicial Process in America, 263-64 (4th ed. 1998). Political pressures on state trial and appellate judges who must run for election or re-election include, but are not limited to, the need to raise campaign funds and defend their own judicial decisions. Wiener, *supra;* Carp & Stidham, *supra.*[7]

Another supposed "limitation" of federal administrative actions is their "protracted" nature, which allegedly allows technological progress to "race ahead of the agency's often deliberate pace." Leflar Br. 13. But however dissatisfied the authors of the Leflar Brief may be with the pace of federal administrative agencies, they cannot seriously contend that tort litigation results in safety issues being resolved more quickly. Most state and federal trial court

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[7] Moreover, numerous commentators would take issue with the Leflar Brief's contention that common-law product liability actions are effective for achieving "reasonable safety." Leflar Br. 13. For example, critics from all ends of the political spectrum agree that, in addressing asbestos-related claims, the tort system has failed to achieve either "reasonable safety" or just compensation for those injured. *See Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2302 & n.1 (1999) (summarizing "[t]he most objectionable aspects" of the "elephantine mass of asbestos cases"); *Asbestos Litigation Problem*, Hearing of the Subcomm. on Administrative Oversight and the Courts of the Senate Committee on the Judiciary, 106th Cong. (1999) (Testimony of Prof. Michael Green [one of the authors of the Leflar Brief]), available at 1999 WL 27595226 (arguing that "[a]sbestos compensation through the tort system is broken -- seriously, irreparably, and incontrovertibly").

dockets are jammed, resulting in years of delay before a product liability case can be tried.[8] Partially as a result of long delays, less than 3% of state court product liability cases ever go to jury trial, and less than 1% go to bench trial. Brian Ostrom and Neal Kauder, *Examining the Work of State Courts, 1994: A National Perspective from the Court Statistics Project,* National Center for State Courts (1996), at 34. Instead, the vast majority are settled or dismissed. *Id.* Indeed, as this very case shows, whether the product used by a plaintiff was defective can take years to resolve: Ms. Geier was injured more than seven years ago, yet her case has yet to go to trial.

The Leflar Brief also faults federal administrative agencies for their allegedly "limited agency resources and attention spans." Leflar Br. at 13. The brief alleges that agencies may fail to address "[i]nformation about newly-discovered product risks or more effective safety designs" because the agency has other, "more compelling" priorities. *Id.* But if NHTSA has not addressed a particular safety concern, the issue of federal preemption never arises; there can be no conflict between state regulation and a federal

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[8] *See generally* Donovan Leisure Newton & Irvine ADR Practice Book, 605 PLI/Lit 947, 949 (1999) ("Perhaps the most descriptive words for present day civil litigation are 'glut' and 'stagnation'. . . [A] litigant who gets a significant case to trial within three to four years is doing very well; often it takes eight to ten years or more."); John Burritt McArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits*, 24 Hofstra L. Rev. 867 (1996) ("Delay and backlogs are regular features of American Justice."); Brian Ostrom and Neal Kauder, *Examining the Work of State Courts, 1994: A National Perspective from the Court Statistics Project,* National Center for State Courts (1996), at 35 (presenting statistics on the length of time from filing to disposition of state court product liability actions).

product-safety policy if the federal government has not developed a policy with respect to a specific safety concern. Moreover, the complaint regarding "limited agency resources" is wholly misplaced within the context of this case: NHTSA has devoted more resources to Standard 208 than to any other motor vehicle safety standard in its history.

Furthermore, the Leflar Brief provides no support for its assertion that federal agencies are inferior to tort suits in their fact-finding abilities. NHTSA, for example, has resources (including, *e.g.*, expertise, experience, information-gathering powers, national perspective, and funding) that dwarf those of any trial jury. NHTSA has performed thousands of crash tests in order to investigate air-bag safety; no jury can begin to replicate the expertise thus acquired. Indeed, the Leflar Brief acknowledges that federal agencies regulate product safety "more expertly" than juries. *Id.* at 18. *See also* Timothy Wilton, *Federalism Issues in "No Airbag" Tort Claims: Preemption and Reciprocal Comity*, 61 Notre Dame L. Rev. 30 (1986) ("a jury inherently lacks the expertise of NHTSA in evaluating . . . information. . . . Even the best trial cannot present a jury with the range of information available to NHTSA.").

In any event, all of these alleged "prudential considerations" for limiting the scope of implied federal preemption are largely beside the point. Congress and NHTSA adopted a policy with respect to installation of airbags; given the evidence that common-law tort actions undercut that policy, the actions are impliedly preempted -- regardless whether the Court is inclined to credit any of the prudential arguments raised in the Leflar Brief. Moreover, there is no

evidence that Congress itself thought that product safety could be dealt with more fairly through common-law actions; indeed, it is highly unlikely that Congress would deem the federal government institutionally incapable of addressing such issues as fairly as state courts. The relevant inquiry in this case is whether Congress intended to impose limitations on the preemptive scope of its own federal policies. In the absence of such evidence, there is no reason to consider any of the "prudential considerations" raised in the Leflar Brief.

Finally, the authors of the Leflar Brief assert that common law tort actions serve many interests not served by federal regulatory programs -- including compensation of the injured, spreading the risk of loss throughout the entire population, and upholding consumer expectations. Leflar Br. 16-19. They assert that those interests are "worthy of respect in our federal system" and thus should be subject to federal preemption only in the rarest of circumstances. *Id.*

But to the extent that common-law tort actions undercut federal policy on air-bag installation, preemption is clearly mandated under existing case law, regardless whether the tort actions serve interests distinct from those served by the federal programs they undercut. The Court has stated repeatedly that tort actions that undercut federal policy are no less subject to preemption than "positive" actions under state law -- such as statutes or written regulations issued by a state agency. As the Court explained in *Cipollone:*

> [S]tate regulation can be as effectively asserted through an award of damages as through some other form of preventive relief. The obligation to pay compensation

> can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

Cipollone, 505 U.S. at 521 (plurality opinion) (citation omitted); *accord, id.* at 548 (Scalia, J., concurring in the judgment in part and dissenting in part).

A majority of the Court reaffirmed that principle in *Medtronic*; as Justice Breyer explained, in parsing the preemption language of the Medical Devices Amendments of 1976:

> One can reasonably read the word "requirement" as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law. . . . [O]rdinarily, insofar as the MDA pre-empts a state requirement embodied in a state statute, rule, regulation, or other administrative action, it would also pre-empt a similar requirement that takes the form of a standard of care or behavior imposed by a state-law tort action.

Medtronic, 518 U.S. at 504-05 (Breyer, J., concurring in part and concurring in the judgment); *accord, id.* at 512 (O'Connor, J., concurring in part and dissenting in part).

Petitioners argue that a judgment entered in 1999 will not retroactively affect how automobile manufacturers actually responded to Standard 208 in their production of 1987 model cars (such as Petitioners' 1987 Honda Accord). That is an unprincipled view of preemption. Tort law is premised on a state-law duty -- here, alleged to consist of a duty to install airbags in any 1987 vehicles. NHTSA could not have implemented its phase-in policy, which was

dependent on achieving a variety of restraint designs, if state law imposed that duty. Had they believed that such a duty existed, manufacturers (contrary to Congress's and NHTSA's policy goal) would have rushed to install airbags in all new cars.[9] Moreover, the federal government would have a much more difficult time obtaining compliance with future federal policies regarding product safety if the Court were to find against federal preemption in this case.

In sum, as the Court made clear in both *Cipollone* and *Medtronic*, states may not avoid the preemptive effect of federal law by regulating through their common law rather than through statutes or administrative regulations. In either circumstance, state regulation is impliedly preempted if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress -- regardless whether (as Petitioners contend) common-law tort actions deal with product safety issues more fairly than do federal administrative agencies and regardless whether they serve interests not served by federal administrative regulation.

[9] The authors of the Leflar Brief suggest that manufacturers who followed the federal phase-in policy did so because they had decided to assume "the risk of later paying tort damages." Leflar Br. 7. Given the catastrophic effect that tort damage awards can have on even the largest corporations, it is unrealistic to think that any manufacturer would have assumed such a risk voluntarily unless it had assured itself that adherence to federal policy protected it from common-law tort liability.

IV. FEDERAL AGENCIES SHOULD NOT BE REQUIRED TO PREDICT WHAT UNKNOWN FUTURE TORT CLAIMS MIGHT CONFLICT WITH THE STATUTES, REGULATIONS, AND PROGRAMS THEY ADMINISTER

The authors of the Leflar Brief also propose that the scope of implied conflict preemption be constricted in one other significant way. They argue that claims under the second prong of implied conflict preemption (preemption of state law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress) should be rejected "unless, at the least, the agency has concluded after notice and opportunity to comment that preemption is necessary to advance the regulatory program's goals." Leflar Br. 22.[10] They assert that such notice-and-comment procedures would ensure that preemption would "be tested by public debate in the political process, rather than imposed on the nation by the federal judiciary." *Id.*

The argument is without merit. WLF notes initially that the Leflar Brief cites no statutory authority for this notice-and-comment requirement. Nothing in the federal Administrative Procedure Act (APA), for example, requires public notice and comment regarding the possible preemptive effect of statutes or regulations on state tort claims. *See* 5 U.S.C. § 553. Thus, it is the authors of the Leflar Brief, not

[10] They also assert that the Court should entirely abandon this second prong of conflict preemption; they argue (without citing case authority) that implied preemption should be limited to cases in which compliance with both federal law and state regulation is a physical impossibility (preemption in such cases is referred to by the Leflar Brief as "dictate preemption"). Leflar Br. 14.

Respondents, who are proposing that the federal judiciary create a new procedural rulemaking requirement and impose it on federal agencies. This Court has stated in no uncertain terms that it is not the role of the federal courts, acting on their own, to create rulemaking procedures utilized by federal agencies. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543-45 (1978).

Furthermore, the Leflar Brief's proposal is hopelessly unworkable. Even assuming that a federal agency wanted to undertake the notice-and-comment procedure that the Leflar Brief suggests, the agency could not possibly identify, in advance, every possible type of federally conflicting tort claim that some plaintiff in some case at some point in the future might attempt to assert under the current (or future) law of any of the 50 states. There is little to recommend a procedural rule that would allow common-law tort actions to go forward even when (as Honda has demonstrated here) they stand as an obstacle to the accomplishment and execution of the full purposes and objectives of a federal safety policy, simply because an administrative agency failed to anticipate that such actions might be brought.

Finally, the Leflar Brief's argument overlooks a key aspect of federal preemption: it is Congress and the operation of the Supremacy Clause that determine the preemptive scope of federal law. Once NHTSA has established a federal motor vehicle safety standard, it is not NHTSA's role to determine whether to permit states to enforce laws that conflict with that standard. *See Medtronic*, 518 U.S. at 512 (O'Connor, J. concurring in part and dissenting in

part).[11] By authorizing NHTSA to issue nationwide vehicle safety standards, Congress preempted all state laws that conflict with any properly promulgated standards. Accordingly, NHTSA has no authority to conduct notice-and-comment proceedings that would purport to second-guess the preemptive scope attached by Congress to NHTSA standards.

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[11] The Safety Act plainly authorized NHTSA to establish its passive restraint system policy by issuing Standard 208, and WLF does not understand Petitioners to contend otherwise.

CONCLUSION

For the foregoing reasons and those presented in Respondents' brief, *amicus curiae* Washington Legal Foundation respectfully requests that the decision of the court below be affirmed.

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Supreme Court of the United States

GEIER, ET AL.,

Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Business Roundtable is an association of chief executive officers of leading corporations with a combined workforce of more than 10 million employees in the United States. The chief executives are committed to advocating public policies that foster vigorous economic growth and a dynamic global economy.[1] The companies represented in The Roundtable engaged in a wide variety of businesses. These businesses are involved in litigation in federal and state courts and administrative agencies across the United States. In many instances, they are subject to inconsistent or even conflicting regulatory requirements of different states. For these businesses, continued economic success requires effective, uniform, and predictable national standards in important areas of law.

This brief supports the respondents, and argues that there should be no presumption against preemption of state law. Such a presumption has not been applied consistently by this Court and is contrary to the Framers' purpose in adopting the Supremacy Clause. By rejecting that presumption, this Court can realize the original intent to give Congress the powers to nurture a vibrant national economy with uniform legal standards.

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[1] Pursuant to Rule 37, both petitioners and respondents have consented to filing of this brief in letters that are on file in the Clerk's office. The undersigned counsel alone have authored this brief, and no other person has made a monetary contribution to its preparation.

SUMMARY OF ARGUMENT

This Court's analysis of preemption under the Supremacy Clause has sometimes included a presumption against the preemption of state laws, and sometimes not. When articulated, that presumption customarily has not been accompanied by any explanation of its constitutional foundation. Petitioners rely heavily on that presumption in this case, yet similarly provide no reasoned basis for presuming that state law is not preempted. *See, e.g.*, Brief for Petitioners at 17. This inconsistently applied presumption should be reconsidered and abandoned.

First, a presumption against federal preemption flatly contradicts this Court's correct insistence that congressional intent is the "touchstone" of preemption analysis. A presumption against preemption necessarily defeats that touchstone. Since congressional intent should control preemption analysis, this Court should construe congressional enactments without placing any thumbs on the interpretative scales.

Second, nothing in the text of the Supremacy Clause, or the deliberations of the Framers, or the federal structure of the Constitution, supports the judicial creation of a presumption against preemption of state laws. Because of their sharp distrust of state governments and state courts, the Framers directed through the Supremacy Clause that the federal government shall not be crippled by state encroachments on its power, as occurred during the Confederation years. The Framers' commitment to restraining state powers militates strongly against any presumption in favor of state laws. This Court should not create limits on federal powers that were neither written

into the Constitution nor contemplated by the Framers. As it has in many cases over the years, this Court should analyze the preemption of state law as a straightforward question of statutory interpretation, without any presumption in favor of, or against, state law.

ARGUMENT

I. The Inconsistently Applied Presumption Against Preemption Of State Law Undermines Congressional Intent As The "Touchstone" Of Preemption Analysis

Under the Supremacy Clause, "the purpose of Congress is the ultimate touchstone" in determining whether state law has been preempted. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Despite that statement, *Medtronic* embraced a broad presumption against preemption (518 U.S. at 485):

> in all preemption cases, and particularly those in which Congress has legislated . . . in a field which the states have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (internal quotation marks omitted)).

Petitioners and their supporting *amici* rely heavily on this presumption. *See, e.g.*, Brief for Petitioners at 17, 50; Brief of Association of Trial Lawyers of America at 9-10; Brief of States of Missouri, *et al.* at 9-10.

This Court has not directly confronted the inherent contradiction between those two pronouncements. Since the purpose of Congress is truly the "touchstone" of preemption analysis, a presumption against preemption can only lead the Court away from that touchstone, substituting instead a bias in favor of preserving state law.

In addition, this Court has not applied that presumption consistently. In a variety of decisions involving the preemption of state common law, the Court has made no mention of any such presumption.

For example, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984), found that a state common law claim was not preempted, and used no language suggesting a presumption against preemption. *See also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 57 (1987) (holding state common law claims preempted by ERISA without mention of presumption against preemption). Many decisions under the National Labor Relations Act also have addressed the preemption of state law claims without employing a presumption against preemption. *E.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) (bad faith handling of insurance claim); *Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290 (1977) (intentional infliction of emotional distress claim); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966) (libel claim); *International Union, United Auto, etc. v. Russell*, 356 U.S. 634 (1958) (wrongful interference with occupation claim).

The leading case proclaiming a presumption against preemption, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), announced the "assumption" that the state's police powers are not superseded by federal law unless

that is the "clear and manifest purpose of Congress." Although *Rice* found that the state warehouse regulations at issue were partially preempted, it has been cited almost formulaically in support of a presumption against preemption. *E.g., Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). Neither those rulings, nor *Rice*, provide a reasoned analysis of the constitutional basis for that presumption.

Moreover, in the fifty years since *Rice* the Court has issued a wide range of preemption decisions that never refer to a presumption against preemption of state statutes and regulations, resolving the preemption question before the Court through ordinary statutory construction. *E.g., Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *American Airlines v. Wolens*, 513 U.S. 219 (1995); *Morales v. Trans World Airlines*, 504 U.S. 374 (1992); *Norfolk & Western R. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). In fact, this Court's early preemption rulings never referred to any presumption that state law is not preempted by federal laws. *E.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 343-44 (1816); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

A presumption of such uncertain provenance and such inconsistent application should be reexamined and abandoned by this Court. There is no constitutional basis for it.

II. A Presumption Against Preemption Is Not Supported By The Text Or Purpose Of The Supremacy Clause, Or The Constitutional Structure

The Supremacy Clause proclaims the preemption of state laws that conflict with federal law (U.S. Const., Art VI, cl. 2):

> This Constitution, and the Laws and Treaties of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The text is clear: Federal law is supreme and state court judges are specifically instructed to respect that supremacy, no matter what state law may provide.

The proper federal-state relationship was at the center of many of the constitutional debates in 1787. The delegates to the Philadelphia Convention deliberated at length over how to construct a strong national government while leaving proper scope to the states. The constitutional debates reinforce three key principles about preemption that are embodied in the Supremacy Clause.

> *First*, the federal government must be guarded from state encroachments on its authority.
>
> *Second*, the Framers were skeptical of claims of state sovereignty and harbored a particular distrust of the state courts.

> *Third*, the Framers accorded to the federal judiciary the principal responsibility of balancing federal and state authority.

Each of these principles is opposed to a presumption against preemption. Moreover, the federal structure does not, by itself, justify such a presumption. Because the Supremacy Clause assigns to this Court a special duty to protect the national government from state encroachment, that presumption has no place in preemption cases.

A. Opening Debates: Protecting the Federal Government From the States

The Philadelphia Convention was prompted by concern over the weakness of the central government under the Articles of Confederation, and the excessive powers of the states. *See* Madison, Notes of Debates in the Federal Convention of 1787 14 (convention triggered by "the imbecility and anticipated dissolution of the Confederacy"). The question of federal supremacy was at the center of the opening proposal by Edmund Randolph known as the "Virginia Plan." In presenting this proposal on May 29, 1787, Randolph enumerated the defects of the Articles of Confederation (Madison at 29-30 (emphasis added)):

> 1. that the confederation produced no security against foreign invasion . . . [and] *particular states might by their conduct provoke war without controul* . . .
>
> 2. *that the federal government could not check the quarrels between states, nor a rebellion in any* . . .

* * *

> 4. *that the federal government could not defend itself against the incroachments from the states.*
>
> 5. *that it [the confederation] was not even paramount to the state constitutions, ratified, as it was in many of the states.*

Randolph's fourth point reflected the Framers' overriding concern that the new federal government must be protected from state encroachments on its power and authority. George Mason of Virginia echoed Randolph's views the next day, taking Randolph's point one step further. Mason "observed that the present confederation was not only deficient in not providing for coercion & punishment agst. delinquent States; but argued very cogently that punishment could not in the nature of things be executed on the states collectively, and therefore that such a Govt. was necessary as could directly operate on individuals[.]" 1 Farrand, The Records of the Federal Convention of 1787 34.

The need for a federal judiciary to control state encroachments also emerged early in the deliberations. On June 5, John Rutledge of South Carolina moved to deny Congress the power to establish inferior federal courts. Madison sprang to the defense of federal courts and scorned the state courts (1 Farrand at 124 (emphasis added)):

> unless inferior [federal] tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a

> remedy. *What was to be done after improper Verdicts in State tribunals obtained from the biassed directions of a dependent Judge, or the local prejudices of an undirected jury?* To remand the cause for a new trial would answer no purpose . . . [.]

Influential delegates shared Madison's concern that the states would cripple federal authority. On June 6, James Wilson rose (1 Farrand at 137):

> [Wilson] saw no incompatibility between the national & State Govts. provided the latter were restrained to certain local purposes; nor any probability of their being devoured by the former. In all confederated systems antient & modern the reverse had happened; the Generality being destroyed gradually by the usurpations of the parts composing it.

Wilson returned to this theme the next day, asserting that "he did not see the danger of the States being devoured by the Nationl. Govt.; [O]n the contrary, he wished to keep them from devouring the national Govt." 1 Farrand at 153.

The need to reinforce the federal government against state encroachments led Charles Pinckney of South Carolina to move, on June 8, for a congressional veto over state laws. Pinckney argued (1 Farrand at 164):

> the States must be kept in due subordination to the nation; that if the States were left to act of themselves in any case, it wd. be impossible to defend the national prerogatives, however extensive they might be on paper; that the acts of Congress had been defeated by this means . . . [.]

Madison quickly supported the motion, echoing the themes Wilson had articulated (1 Farrand at 164-165):

> Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties, to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions. . . . This prerogative of the General Govt. is the great pervading principle that must controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political system.

See also id. at 167 (John Dickinson of Delaware) (same).

Wilson used a colorful image to support Pinckney's proposal. He argued that after an initial show of cooperation among the states under the Articles of Confederation (*id.* at 166):

> No sooner were the State Govts. formed than their jealousy & ambition began to display themselves. Each endeavoured to cut a slice from the common loaf, to add to its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands.

The congressional veto was not adopted at that time, *see* 1 Farrand at 171-73, but surfaced again on June 13 as Article 6 of the report of the Committee of the Whole on the Virginia Plan. Article 6 stated that "the Natl. Legislature ought to be empowered to . . . negative all laws passed by the several States contravening in the opinion of the National Legislature the articles of Union, or any

treaties subsisting under the authority of the Union." 1 Farrand at 236.

A competing framework for the new government was unveiled on June 15, when William Paterson presented the New Jersey Plan, which was designed to protect state powers and did not provide for lower federal courts. 1 Farrand at 242-245. Madison vehemently opposed the New Jersey Plan as unwisely undermining federal powers (1 Farrand at 316-322):

> 2. Will it prevent encroachments on the federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic antient and Modern. . . .
>
> 3. Will it prevent trespasses of the States on each other? Of these enough has been already seen. . . . The plan of Mr. Paterson, not giving even a negative on the Acts of the States, left them as much at liberty as ever to execute their unrighteous projects agst. each other.

B. The Framers' Ambivalence Towards State Sovereignty

After the New Jersey Plan was quickly set aside, *see* 1 Farrand at 322, the delegates returned to the question of state sovereignty, with Alexander Hamilton urging the outright abolition of the states. *Id.* at 323. Others offered more tempered views. Rufus King of Massachusetts argued that once a national consolidation occurred, the states would not be sovereign:

> [I]f the Union of the States comprises the idea of a confederation, it comprises that also of consolidation. A Union of the States is a union of the men composing them, from whence a *national* character results to the whole. . . . If the States therefore retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it.

Id. at 323-324 (emphasis in original). King "doubted much the practicability of annihilating the States; but thought that much of their power ought to be taken from them." *Id.* at 324; *see id.* at 467 (E. Gerry of Massachusetts) ("we never were independent states, were not such now, & never could be even on the principles of the Confederation").

The delegates then debated the role of the states in selecting the national legislature. As described by William Johnson of Connecticut on June 21, the Wilson/Madison position was "to leave the States in possession of a considerable, tho' a subordinate jurisdiction." *Id.* at 355. He asked how that should be achieved in determining representation in the national legislature. In responding, Wilson emphasized that he "conceived that in spite of every precaution the General Govt. would be in perpetual danger of encroachments from the State Govts." *Id.* at 356.

Madison also emphasized to Johnson the need to protect the federal government. He agreed with Wilson that "there was 1. less danger of encroachment from the Genl. Govt. than from the State Govts. 2. that the mischief from encroachments would be less fatal if made by the former, than if made by the latter." *Id.* Madison stressed

that the "great objection" against abolishing the states "was that the Gen'l Gov't could not extend its care to all the minute objects which fell under the cognizance of the local jurisdiction." The risk, then, was not "abuse" by the national government, but "imperfect use that could be made of [its power] throughout so great an extent of country." *Id.* at 357. In short, under the new Constitution the state governments would be a convenience, not competing sovereigns.

C. The Federal Judiciary Must Control State Encroachments

On July 17, the delegates returned to the proposed congressional veto of state legislation. Roger Sherman of Connecticut proposed a compromise, observing that "it would be difficult to draw the line between the powers of the Gen'l Legislatures and those to be left with the States." Sherman proposed (2 Farrand at 25):

> to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the Government of the individual States in any matters of internal police which respect the Govt. of such States only, and wherein the General welfare of the U. States is not concerned.

Like Madison and Wilson, Sherman thus suggested two distinct areas of government action: any federal law addressing "the common interests of the Union" would be supreme; matters of "internal police" would be left to the states so long as no national interest was implicated.

This critical debate ultimately was resolved along the lines proposed by Sherman and Gouverneur Morris of Pennsylvania. Morris argued forcefully that the congressional veto was "likely to be terrible to the States and not necessary, if sufficient legislative authority should be given to the Gen'l Government." 2 Farrand at 27. Morris endorsed the solution put forth by Sherman as a less offensive means of ensuring the supremacy of federal law (*Id.* at 28 (emphasis added)):

> "[Morris] was more & more opposed to the negative. The proposal of it would disgust all the States. *A [state] law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. law.*

This resolution included the central features of modern preemption doctrine. The federal judiciary had the duty to set aside state laws encroaching on federal powers. If the federal Courts failed in that duty, Congress could enact unquestionably preemptive legislation. Following this synthesis of the supremacy issue, the delegates rejected the congressional veto. 2 Farrand at 28.

Immediately after this vote, the Convention unanimously approved a new proposed resolution, which was the first version of the Supremacy Clause (2 Farrand at 22):

> Resolved that the legislative acts of the United States made by virtue and in pursuance of the articles of Union and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States as far as those acts or Treaties shall relate to the

> said States, or their Citizens and Inhabitants – and that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.

This resolution embodied the views of Madison, Wilson, Sherman, and Morris that federal law must be both supreme and enforced by the federal judiciary. *Id.* This provision also specifically expressed the delegates' distrust of state authority and especially state courts.

The next version of the Supremacy Clause emerged from the Committee of Detail on August 6, as Article VIII of the draft charter (2 Farrand at 183):

> The Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; anything in the Constitutions or laws of the several States to the contrary notwithstanding.

As with the first draft, the principles contained in this provision were unanimously approved by the delegates. Article VIII drew little comment during the vigorous debate on the report of the Committee of Detail. *See* 2 Farrand at 380-395 (debating other provisions, but not Article VIII).

The final Committee of Style reported to the Convention on September 12. The Supremacy Clause now appeared as Article VI, and was little changed (2 Farrand at 603):

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

The final text thus continued to express the Framers' distrust of the states, especially state courts. The third clause specifically commands that "the judges in every state shall be bound" by the Supremacy Clause.

In a debate later that same day on the power of states to lay duties on trade, Madison repeated Gouverneur Morris' view that the federal judiciary must control the power of the states: "The jurisdiction of the supreme Court must be the source of redress. So far only had provision been made by the plan agst. injurious acts of the States." 2 Farrand at 589. That special responsibility resides in this Court still.

D. The Federal Structure Does Not Support a Presumption Against Preemption of State Law

The presumption in favor of state law cannot be justified as somehow supporting the structure of federal-state powers established by the Constitution. In the First Congress, Madison explained that as long as Congress exercised a delegated power under the Constitution, that power stands supreme (2 Annals of Cong. 1897 (1791) (quoted in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985))):

> Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.[2]

During the ratification debates, Madison and Hamilton each stressed that the constitutional structure ensures federal supremacy, not any presumption in favor of state law. In Federalist No. 34, Hamilton argued that in any consolidation of states, the incorporated units necessarily surrender sovereignty (C. Rossiter ed. 172):

> If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY.

---

[2] Consistent with this reasoning, the adoption of the Tenth Amendment in 1791 in no way modified the Supremacy Clause or the role of this Court in enforcing it. The Tenth Amendment confirms that Congress has limited powers, and non-delegated powers remain with the states and the people. The Supremacy Clause, on the other hand, operates when Congress has acted pursuant to its delegated powers.

See also J. Story, Commentaries on the Constitution 684 (employing Hamilton's language and making similar arguments).

Madison, in No. 44, also insisted the Supremacy Clause protected the federal-state structure. He pointed out that some state constitutions "invest the State legislatures with absolute sovereignty in all cases not excepted by the existing Articles of Confederation." The Federalist No. 44, C. Rossiter ed. 254. Without the Supremacy Clause, Madison observed, the Constitution would have been "radically defective" (*id.* at 255):

> In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to its parts; it would have seen a monster, in which the head was under the direction of the members.

The paramount purpose of the Supremacy Clause was to establish and preserve federal prerogatives. State governments, acting on local matters, warranted due respect. But the Framers intended to protect the federal "common loaf" from being sliced up by the states, each intent on its own "morsel." A presumption against preemption of state law tilts the Court's analysis of preemption and thwarts the Framers' intent that the Court apply federal law without bias in favor of, or against, state authority.

CONCLUSION

Justice Holmes wrote (O.W. Holmes, Collected Legal Papers, 291, 295-296):

> I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.

That concern guided the Framers in crafting the Supremacy Clause, and guides this Court in its enforcement. The presumption against preemption of state law, which has intermittently been recited in this Court's preemption decisions without careful analysis, should be abandoned as contrary to that fundamental national principle.

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In The

Supreme Court of the United States

ALEXIS GEIER, et al.,

Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICUS CURIAE GENERAL MOTORS CORPORATION SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE

There are over 100 million vehicles without airbags on U.S. roads, and petitioners' "no airbag" claim would condemn them as defective. Amicus Curiae General Motors Corporation ("GM")[1] is the world's largest automobile manufacturer, and has the most cars on U.S. roads; accordingly, GM has a unique and significant interest in a correct decision in this case. Also, GM was a pioneer in airbag technology, and participated in the rulemaking process for Federal Motor Vehicle Safety Standard 208 (FMVSS 208), the occupant restraint standard, from the beginning. GM has played a central role in the development of the case law on the issue here; it was a party in the first three circuit court decisions to address the "airbag" preemption issue.[2] Thus GM has significant experience and knowledge regarding the applicable law and relevant regulatory history. It submits this brief in support of respondents.

SUMMARY OF ARGUMENT

FMVSS 208 granted manufacturers options to install in 1987 cars different restraint systems, including different passive restraint systems and manual seat belts. Transportation Secretary Dole specifically "declined to mandate airbag restraint systems in all vehicles," as petitioners put it (P. Br. at 9), because she judged that mandating airbags or any other single passive restraint system "runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems," 49 Fed. Reg. 28962,

---

[1] Under Rule 37.3(a), the parties have consented to the filing of this *amicus curiae* brief. Letters evidencing that consent are on file in the Clerk's office. This brief has been written only by counsel for GM, and GM alone has provided the funds for its preparation and submission.

[2] *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990).

29001 (1984). That judgment was not novel. Options and the flexibility that went with them had been at the heart of FMVSS 208, indeed essential to its regulatory scheme, from its beginning.

Petitioners' no airbag claim, if allowed, would impose on manufacturers a state-law duty to install airbags in all cars, or impose tort damages on them if they did not. Accordingly, it would in effect take away the manufacturer's option to install manual seat belts or other passive restraints, not airbags, in cars, and punish the manufacturers, after the fact, for doing exactly what federal law authorized, and encouraged, them to do. Therefore, the overwhelming body of lower court authority held that petitioners' claim, if allowed, would "frustrate the regulatory scheme," "undermine the flexibility" essential to it, and "flatly" conflict with it; so, DOT, NHTSA and the Solicitor General explain, it would "disserve safety" and so must be preempted.

Petitioners' response proposes to abandon, or disregard, 100 years of settled Supreme Court preemption law. Thus they posit that a presumption against preemption saves their claim. But presumptions have no place here; state law that conflicts with federal law is, in this Court's words, "preempted by direct operation of the Supremacy Clause," "without effect," and "void." Petitioners also posit that, contrary to all other rules, state common-law rules that stand as an obstacle to federal law are not preempted; but this Court has repeatedly held that they are. Still, petitioners posit that their common-law claim is saved because it would serve safety. But NHTSA found that it would disserve safety. And even if it served safety, this Court holds a "state law is also preempted if it interferes with the methods by which Congress intended to meet" its goal.

Petitioners go on to propose new rules, and quarrel with the regulations they seek to undermine. Thus they propose that the common law does not regulate, but this Court has repeatedly held that it does. They propose that common-law duties are, in some metaphysical sense, general, but this Court

has repeatedly held that, general or not, they impose "requirements and prohibitions," and petitioners' proposed airbag requirement conflicts with federal law. Petitioners propose that FMVSS set performance, not design, standards, and so cannot conflict with common-law design standards. But Congress and this Court have required FMVSS 208 to speak to designs; it does; and petitioners' common-law design standard conflicts with it.

Petitioners propose, last, that the National Traffic and Motor Vehicle Safety Act's supposed savings clause saves their claim from preemption. It does not. First, it speaks to a defendant's "compliance" with federal law. Compliance, a merits defense, has nothing to do with preemption, and vice versa: Federal law preempts or not, by operation of federal law, regardless of compliance, and a private party by unilateral private noncompliance cannot un-preempt. Therefore, the "savings clause" has nothing to do with preemption on its face, and the legislative history, petitioners' own explication of "axiomatic" common-law principles, and the early Safety Act case law all demonstrate that the clause means exactly what it says.

Second, even if directed at preemption, the "savings clause" at most serves this traditional function: to make clear Congress' intent not to "occupy the field," and thus to save all claims that do not conflict with federal law, but not those that do. Again, the first 20 years of Safety Act case law gave it just that function.

Third, a general savings clause in no event saves a claim that actually conflicts with the Act that contains the clause. An unbroken chain of authority, 1907-1998, so holds, and necessarily so. The Supremacy Clause preempts conflicting state law. This Court has never assumed that Congress would be so cavalier as to discard the Supremacy Clause, and so accord conflicting state laws a free pass to undermine Congress' laws, all through a general savings clause that does not address whatever future conflict came to be in issue, and in the nature of things could not.

A state common-law claim that actually conflicts with an FMVSS is, in the First Circuit's words, a "rare event, indeed." This, as the overwhelming weight of lower court authority holds, is that rare event. Therefore petitioners' claim is preempted.

ARGUMENT

Petitioners' claim, if allowed, would conflict with FMVSS 208 and the Safety Act, and so is preempted. Petitioners[3] seek to avoid that truth by ignoring FMVSS 208's purpose, disregarding settled conflict preemption principles, inventing new ones, and, finally, according this Act's so-called savings clause an effect no savings clause has ever been accorded by this Court before.

We address FMVSS 208's history and purpose first (Part A); how plaintiffs' claim would conflict with FMVSS 208 and undermine its purpose, and so is preempted by it, next (Part B); and, last, how the so-called savings clause does not and could not save that undermining claim (Part C).[4]

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[3] We refer to the Brief for Petitioners as "P. Brief"; to the Brief of the United States as Amicus Curiae Supporting Affirmance as "U.S. Br."; and to the briefs of the amici supporting petitioners by amici's names as follows: Attorneys Information Exchange Group brief ("AIEG Br."); Association Of Trial Lawyers Of America brief ("ATLA Br."); National Conference Of State Legislatures, Counsel Of State Governments, National Association Of Counties, National League Of Cities, International City/County Management Association And U.S. Conference Of Mayors brief ("NCSL Br."); States Of Missouri, Arizona, California, Colorado, Connecticut, Delaware, Iowa, Kansas, Montana, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont and Washington brief ("Mo. Br."); Robert B. Leflar, Robert S. Adler, Michael Green, And Joseph A. Page Br. ("Leflar Br.").

[4] The D.C. Circuit found implied preemption, and GM focuses on why that was correct. Honda and other amici address express preemption, and petitioners' errors as to it.

A. FMVSS 208's Options And The Safety Purposes Behind Them.

Options and the flexibility that went with them have been at the heart of FMVSS 208, indeed, essential to its regulatory scheme, from its beginning. This is the regulation's history.

1. The Pre-1984 Option-Based Standards.

Before 1972 FMVSS 208 accorded manufacturers the option to install manual seat belts or various passive restraints in cars. 32 Fed. Reg. 2415 (1967). "[T]he safety benefits of wearing seatbelts are not in doubt. . . . " *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). However, manual belts are "active restraints," because the occupant must act to use them, and many people did not use them. So in 1972 the Department of Transportation ("DOT") amended FMVSS 208 to require installation of airbags or automatic belts – both passive restraints – in cars built after August 15, 1975. DOT also required "vehicles built between August 1973 and August 1975 . . . to carry either passive restraints or [manual] lap and shoulder belts coupled with an 'ignition interlock' that would prevent starting the vehicle if the belts were not connected." *Id.* at 35.

The ignition interlock rule caused a public outcry, and in 1974 Congress outlawed the "ignition interlock" standard, mandated that manufacturers retain the option to install manual belt systems, and prohibited DOT from requiring airbags or any other nonbelt restraint system unless, among other things, such a standard had been submitted first to both houses of Congress and not disapproved by them. 15 U.S.C. § 1410b(b), (c). *See* H.R. Rep. No. 93-1452 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6084, 6108; 120 Cong. Rec. 27816, 27822 (1974).[5]

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[5] Even if the legislative veto aspect of § 1410b fails (*see INS v. Chadha*, 462 U.S. 919 (1983)), Congress' intent to mandate options, including the manual belt option, is clear.

Accordingly, DOT deleted the ignition interlock requirement, 39 Fed. Reg. 38380 (1974), and amended FMVSS 208 to grant manufacturers the same options it provided before the ignition interlock episode. Thereafter, FMVSS 208 granted those same options, and rejected a mandatory passive restraint rule, in every model year from 1976-1987. For very good reasons:

In 1976, Secretary Coleman, after lengthy study, determined not to mandate passive restraints. 41 Fed. Reg. 24070 (1976); 41 Fed. Reg. 36494 (1976); *see also* 42 Fed. Reg. 5071 (1977). He reasoned that: (1) A policy "unacceptable" to the public would contravene the "goal of safety," and "every sampling of public opinion" showed most Americans opposed mandatory passive restraints. Secretary's Decision Concerning Vehicle Occupant Crash Protection, D.O.T., at 6, 11, 32, 52-57 (Dec. 6, 1976). (2) More data was needed before mandating passive restraints or any one of them. *Id.* at 9, 12, 27, 34, 57. (3) Increased manual belt use would make passive restraints unnecessary; airbags gave no greater protection than seat belts, when used. *Id.* at 7, 13, 29, 33. The Secretary concluded the "cause of safety would not be served" by mandating airbags or any passive restraints "at the present time." *Id.* at 27, 30-31, 34, 36; *see also* 41 Fed. Reg. at 24070-71.

In 1977, Secretary Adams required some form of passive restraints to be phased into cars beginning in model year 1982, but continued all FMVSS 208's options until then. He also granted manufacturers the option to choose which passive system to install before and after 1982, and so rejected an airbag-only standard at all times. *See* 42 Fed. Reg. 34289, 34290-96 (1977), 61468 (1977); 46 Fed. Reg. 53419, 53420 (1981); *see also Pacific Legal Found. v. Department of Transp.*, 593 F.2d 1338, 1348 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979).[6]

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[6] That prospective mandatory passive restraint regulation was submitted to Congress and not disapproved by it. But Congress declined DOT funding "to implement or enforce any standard or regulation which requires any motor vehicle to be equipped with an occupant restraint system (other than a belt system)." Department of Transportation and Related Agencies Appropriation Act, Pub. L. No. 95-335, § 317, 92 Stat. 450 (1978); Department of Transportation and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-131, § 317(a), 93 Stat. 1039 (1979).

In 1981, Secretary Lewis delayed Adams' passive restraint phase-in for one year, 46 Fed. Reg. 12033, 12034 (1981); 46 Fed. Reg. 21172, 21174-75 (1981), and then rescinded it, noting, among other things, that increased manual belt use would effect an "immediate impact . . . many times greater" than mandatory passive restraints. 46 Fed. Reg. at 53419-25. He concluded manufacturers should "continue to have the current option." *Id.* at 53419.

Upon review, this Court held that Secretary Lewis had not sufficiently set forth his reasons for rescinding the passive restraint requirement, or for not requiring airbags, and remanded for consideration of those things. *State Farm*, 463 U.S. at 52-57.

2. DOT's 1984 Judgment That Diversity, Not A Mandatory Airbag Rule, Best Served Safety.

On remand, Secretary Dole undertook a comprehensive review of all restraint systems, and propounded the rule at issue here. It was challenged and upheld. *See State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 489 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987). The rule called for a measured introduction of passive restraints (no one kind was required), beginning with 10% of cars built in model year 1987 (the year at issue here), and ending with 100% of 1990 model year cars. 49 Fed. Reg. at 28999-29000.

Petitioners and their amici repeatedly claim that an airbag system was DOT's preferred choice. *See* P. Br. at 2, 8, 10-11; AIEG Br. at 15; Leflar Br. at 3-4. It was not. In fact, DOT found mandatory manual belt use laws ("MULs") "would more than match the safety benefits of [a passive

restraint] rule," and "will result in a more substantial reduction in deaths and injuries more quickly and at a lower cost than any other practical alternative." 49 Fed. Reg. at 28998.[7] Secretary Dole summed it up: seat belts if used are "the quickest, least expensive way by far to reduce fatalities and injuries," and "will provide the greatest benefits most quickly." 49 Fed. Reg. at 28962, 28997. Thus FMVSS 208 provided that the passive restraint phase-in was to be canceled if by 1987 states with two-thirds of the population enacted MULs, and to cease after it began if enough states enacted MULs between 1987 and 1989. *Id.* at 28963. Enough complying MULs were not enacted, so the phase-in was completed.

Airbags also were not DOT's preferred choice among passive restraints. Rather, the Secretary determined not to mandate any particular form of passive restraint at any time, before or after phase in. She found "disadvantages to each of the automatic restraint systems," (*id.* at 28998), and found that "public acceptability" of mandatory passive restraints – essential to their use and so their safety benefit – would be enhanced by authorizing manufacturers to install different restraint systems, so the public could choose among them. *Id.* at 28997, 29001. The Secretary found a "number of reasons" not to mandate airbags in particular, *id.* at 29000, including these: (1) "An airbag alone is less effective" than three-point belts when used, *id.* at 28986; (2) airbags are costly, especially to replace, *id.* at 29001; (3) airbags may not protect out-

[7] Thus the proposition that NHTSA wanted airbags in all cars because that was "the safest option" is simply false. Indeed, the Secretary noted that "estimating the effectiveness of [airbags] is very difficult," and "that airbags could range from being 46 percent more effective than the manual belts as used in the same cars to 70 percent less effective." 49 Fed. Reg. at 28985. The Secretary judged that "an airbag alone is less effective than a manual lap and shoulder belt or automatic belt, when those systems are used" (*id.* at 28986), airbags provide no protection in side and rear collisions, may injure out-of-position occupants, and provide only a marginal increase in safety over belts even when used with belts. *Id.* at 28984-85.

of-place occupants and, in fact, might cause injuries, especially to children (unfortunately proved true), *id.* at 28992, 29001; (4) the public feared airbags and may not accept them, *id.* at 29001; (5) more data as to their effectiveness needed to be collected, *id.*; and (6) more time was needed to develop the technology. *Id.* at 28992, 28996. Secretary Dole concluded that mandating airbags or any other passive restraint "runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems." *Id.* at 29001.[8] In particular, "an airbag only decision would unnecessarily stifle innovation in occupant protection systems," and would take away the "latitude" necessary for industry to develop them. *Id.* at 28997.

In sum, from the beginning to the passive restraint phase-in, FMVSS granted – and Congress mandated – the option to install manual seat belts, or the manufacturers' choice of passive restraints, in cars. From the beginning, through the phase-in and indeed up until the 1997 model year, FMVSS 208 granted manufacturers the option as to what passive restraint to install in cars, and specifically rejected a rule mandating airbags or any other single passive system.[9]

3. NHTSA's Statements About FMVSS 208 Preemption And Congress' 1991 Action.

In 1990, the Solicitor General, joined by NHTSA and DOT, opposed certiorari in *Wood v. General Motors*, the first

[8] Petitioners attribute to NHTSA a comment by personal injury lawyer Steven Teret. *See, e.g.*, Pet. Br. at 10. But NHTSA made clear it was summarizing, not endorsing, comments: "Because of the large number of public comments, we have provided a representative sample of the comments made and the commenters who made them." 49 Fed. Reg. at 28966. NHTSA has never welcomed "no airbag" claims as incentives; to the contrary, it has made clear for 10 years that they are preempted. *See* pp. 9-10, below.

[9] Far from being the product of "political winds" (Leflar Br. at 13), options were judged essential by 6 straight administrations (Democratic and Republican).

circuit court to address (and find) "no airbag" claim preemption. Their brief said it would "*disserve* the *safety* purposes of the Act" to allow "no airbag" claims. Brief for the United States as Amicus Curiae, *Wood v. General Motors Corp.*, No. 89-46 (filed Mar. 1990), at 15 (emphasis original).

In 1994, in *Freightliner v. Myrick*, NHTSA and DOT contrasted brake standard cases, where the Agency believed there was no preemption, with "no airbag" cases, where the Agency was clear there was. Brief for the United States as Amicus Curiae, *Freightliner Corp. v. Myrick*, No. 94-286 (filed Dec. 1994) at 28-29 & n.16. The Agency explained that "common-law tort actions that imposed liability for failure to install airbags" would "frustrate[ ] the Secretary's policy judgment," and would have "an adverse effect on safety." *Id.* at 28.

Petitioners' amici advise that Congress would be puzzled that the circuit court here ruled as it did. In fact, Congress would be puzzled if it had not. In 1991 Congress was considering the law that eventually required NHTSA to mandate airbags. NHTSA apprised Congress then that "most courts that have considered the matter have ruled that ["no airbag" claims] are preempted by the [Safety Act] and/or the safety standards issued by NHTSA." Letter to Congress from NHTSA Administrator Jerry Curry, November 7, 1991; H.R. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1783. NHTSA cautioned Congress that the proposed law could call those preemption rulings into question. In response, Congress specifically provided that the new law was not to "be construed by any . . . court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints." Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086.

B. "No Airbag" Claims Undermine FMVSS 208 And Are Therefore Preempted.

The D.C. Circuit, joining five federal circuits, scores of district courts, and 12 state appellate courts, correctly held that "no airbag" claims directly undermine, and so conflict with, the Safety Act, FMVSS 208 and the purposes behind them.

1. The Conflict.

FMVSS 208 "was specifically designed to give automobile manufacturers a choice among several options when providing restraint systems." *Pokorny v. Ford Motor Co.*, 902 F.2d at 1116, 1123 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990). That flexibility – "latitude" – and those options are "essential" to FMVSS 208 and to advance its safety goal. *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 785 (3d Cir. 1992). Indeed, taking those options away, and in particular mandating a single passive restraint choice like airbags, would risk "killing or seriously retarding" development of the best systems. 49 Fed. Reg. at 29001.

Petitioners' no airbag claim, if allowed, would require manufacturers to install airbags in all cars, or impose tort damages on them if they did not. Accordingly, that claim would in effect take the manufacturers' option to install seat belts, not airbags, away. It would also punish a manufacturer, after the fact, for doing what FMVSS 208, in the interests of safety, authorized. Consequently, that standard would, in the Solicitor General's words, "disserve safety" (p. 10, above), and so defeat Congress' and DOT's full and most basic objectives. For a "state common law rule that would, in effect, remove the element of choice authorized in [FMVSS 208] would frustrate the federal regulatory scheme." *Taylor*, 875 F.2d at 827; *Pokorny*, 902 F.2d at 1125 (same); *Buzzard*, 966 F.2d at 783 (no airbag claims would "undermine the flexibility that Congress and the DOT intended to give to manufacturers in deciding whether to include air bags, automatic or manual seat belts in their design.").

Therefore, plaintiff's "no airbag" claim "flatly," *Wood*, 865 F.2d at 401, and impermissibly, conflicts with FMVSS 208. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 (1982) (state action that punishes option granted by federal regulation preempted). For a "state common law rule cannot take away the flexibility provided by a federal regulation," "cannot prohibit the exercise of a federally granted option," and cannot impose damages for doing "what a federal act or regulation 'authorized [one] to do.' " *Taylor*, 875 F.2d at 827 (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981), and holding *de la Cuesta* "demonstrates the rule" and "governs this case"; also citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981)).

2. Petitioners' Efforts To Avoid The Conflict.

Petitioners try to avoid that flat conflict in various ways, none sound.

a. The Contention That Common Law Does Not Regulate.

Petitioners say the common law compensates plaintiffs, but leaves defendants free to act as they will; defendants can just keep on doing what they were found liable for, and keep paying for doing it, petitioners advise. Thus, the argument concludes, the common-law duty petitioners' claim would impose does not regulate and so cannot conflict with FMVSS 208. P. Br. at 47-48; AIEG Br. at 20; ATLA Br. at 15.

That argument disregards *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and the forty years of authority following it: "[State] regulation can be as effectively exerted through an award of damages as through some form of preemptive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.* at 247. *Accord Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality) (quoting and following *Garmon*); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504-05, 509-10 (1996) (quoting and following *Cipollone*; opinions of five Justices); *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 675 (1993).

Petitioners' argument also disregards reality. As petitioners' brief euphemistically puts it, "the threat of future liability imposed through the tort system" is intended as an "incentive" to install airbags. P. Br. at 10. Indeed, petitioners seek $20 million in compensatory and punitive damages, quite an "incentive" by itself. And petitioners' amici confess that the "state law determination of whether a motor vehicle is defectively designed has an objective very similar to NHTSA's goal." Leflar Br. at 17; *see also* AIEG Br. at 4-5; ATLA Br. at 11. Likewise, petitioners' counsel confessed in 1984 that the purpose of "no airbag" claims was to "persuade the auto companies . . . to install airbags in all cars," exactly what NHTSA judged ought not occur. Trial Lawyers for Public Justice 1984 Annual Report.[10]

Nevertheless, petitioners' amici continue, regulations are "prospective in nature," and meant to prevent "socially harmful activities." (NCSL Br. at 14) The point is elusive. Perhaps the idea is that tort claims compensate for injuries, regardless whether the conduct causing them is "socially harmful" or not, or, indeed, as Missouri puts it, "legal or illegal." (Mo. Br.

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[10] Petitioners point to *English v. General Electric Co.*, 496 U.S. 72, 85 (1990), *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988), and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Each noted that damage awards regulated less directly than "direct regulatory authority" does. (*E.g.*, *Goodyear*, 486 U.S. at 186) But none changes *Garmon* or its progeny, much less suggests that common-law standards that conflict with federal standards are not preempted. Nor would they, for neither conflict preemption nor a conflicting common-law standard was in issue in any of them: *Goodyear* merely held that the authority granted a state by Congress to administer workers' compensation claims on federal land included authority to award supplemental sums for injuries resulting from violation of state safety laws; *English* and *Silkwood* were field preemption cases; and *Silkwood* made clear that "state standards" imposed "in a damages action" would be preempted where they "frustrate[d] the objectives of the federal law." *Id.* at 256.

at 3) But of course that is wrong, as petitioners' amici say elsewhere; tort law compensates for "wrongful injury" (ATLA Br. at 9), "unreasonably dangerous products" (*id.* 12), and "socially unreasonable conduct." Leflar Br. 7, 17.

But this excursion is ultimately off point. The issue is whether petitioners' common-law standard undermines the federal standard. It does. Therefore, it is preempted, whatever its purpose. *Ouellette*, 479 U.S. at 494 (state law sharing federal law's "ultimate goal" is preempted if it "interferes with the methods" Congress chose to achieve the goal).

In sum, petitioners' contention that common-law damage claims do not regulate is wrong as a matter of settled law, and, indeed, common sense: If administrative standards whose violation is punishable by thousand dollar fines regulate, multimillion dollar tort judgments do, and especially here. For every frontal crash is a potential no-airbag claim; "[i]n these circumstance," were "no airbag" claims allowed, manufacturer "choice to avoid modification of its design [to include airbags] 'seems akin to the free choice of coming up for air after being under water.' " *Wood*, 865 F.2d at 411 (citation omitted). From the beginning, the overwhelming body of no airbag authority so found. *See, e.g., Baird v. General Motors Corp.*, 654 F. Supp. 28, 32 (N.D. Ohio 1986) (manufacturer would have "but one realistic choice").[11]

b. The Contention That Common-Law Duties Are "General" And So Cannot Conflict.

Two of petitioners' amici argue that common-law duties are "general norms." *See* Mo. Br. at 11; AIEG Br. at 14. A third argues, contrarily, that "statutes and administrative regulations are necessarily abstract and general," but common-law

[11] In fact, punitive damages – sought routinely, and here – are expressly intended to "punish[ ]" defendant's conduct and "deter[ ]" its repetition. *BMW of North Amer., Inc. v. Gore*, 517 U.S. 559, 568 (1996); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

liability is "particular." (NCSL Br. at 12) Whoever is right, the issue is beside the point.

Common-law damages actions "are premised on the existence of a legal duty." *Cipollone*, 505 U.S. at 522 (plurality). Indeed, the common law's "essence" is to "enforce duties that are either affirmative *requirements* or negative *prohibitions*." *Id.* (emphasis in original). The question in this conflict preemption case is not whether this common-law duty is in some metaphysical sense general or specific, but whether the standard it sets and the requirement it imposes undermine – and so conflict with – federal regulations. *See Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 105 (1992) (look to "effects"). This proposed common-law duty would undermine this regulatory structure. Pp. 11-12, above. Therefore, this claim based upon that duty is preempted, and rightly so; "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general [damages] statute," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992), or by general common law. *Medtronic*, 518 U.S. at 504 (Breyer, J., concurring), 518 U.S. at 509 (O'Connor, J., opinion for four Justices, concurring and dissenting); *Easterwood*, 507 U.S. at 664, 675.

c. The Contention That Common-Law Rules Cannot Conflict With Performance Standards.

Petitioners say federal standards set performance, not design, standards (*see, e.g.*, P. Br. at 46; NCSL Br. at 25), and that common-law actions do not establish "objective criteria." ATLA Br. at 3.

These propositions may, generally, be true, but are not here. Section 1410b, unique in the Safety Act, speaks to manual seat belts and passive restraints, both designs, and mandates NHTSA to grant options to install them. P. 5, above. FMVSS 208 in turn undertakes, among other things, to "specify[ ] equipment requirements for active and passive restraint

systems," *see* 49 C.F.R. § 571.208, S2, speaks to particular restraint systems and their design, and so, rare among NHTSA regulations, has "elements of a design standard." *Wood*, 865 F.2d at 417; *see also Gills v. Ford Motor Co.*, 829 F. Supp. 894, 897 (W.D. Ky. 1993) (FMVSS 208 has "unique characteristics"); *Welsh v. Century Prods., Inc.*, 745 F. Supp. 313, 321 (D. Md. 1990) (FMVSS 208 is "unusual regulation"). *See* AIEG Br. at 5 (the cases treat " 'no air bag claims' as a unique issue").[12] Pp. 8-9, above. FMVSS 208 also expressly grants options – also unusual – to choose among those design elements.[13]

Petitioners' common-law claim is likewise, by ATLA's measure, a rarity, for it specifies a very "objective criterion": a car without airbags is defective. Moreover, "airbag suits are of the broadest general applicability – potentially affecting every vehicle on the road – and thus are most similar to a state regulation." *Wood*, 865 F.2d at 418.

Thus the performance/design inquiry undermines petitioners' general thesis. For as the first 20 years of Safety Act cases show (pp. 25, 27, below), a "direct conflict between a

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[12] Petitioners' amici apparently suggest NHTSA cannot regulate design. *See, e.g.*, NCSL Br. at 25. That is certainly wrong. FMVSSs are to "meet the need" for safety, 15 U.S.C. § 1392, and so protect the "public against unreasonable risk of accidents occurring because of the *design*, construction, or performance of a motor vehicle." *Id.*, § 1391(1)c(2) (emphasis added). In fact, this Court remanded the 1977 version of FMVSS 208 so the Secretary could consider whether to mandate airbags – a design (*State Farm*, 463 U.S. at 57) – and Congress ordered NHTSA to permit seat belts (§ 1410(b)), and later to mandate airbags – both designs.

[13] Petitioners say other regulations grant options. P. Br. at 46. Whether or not that is so, FMVSS 208 is unique. Congress specifically endorsed its options in § 1410b; Congress has not endorsed options for any other federal standard. FMVSS 208 granted options for safety reasons over many years; no other standard shares that history. Moreover, it makes no difference whether other standards provide options. If the same considerations and analysis applicable to FMVSS 208 apply to those other standards, they do. If they do not, they do not. They do apply to FMVSS 208.

common-law design standard and a Safety Act performance standard" is a "rare event indeed." *Wood*, 865 F.2d at 402 n.9. This, however, is that rare event.

d. The Contention That Claims Preempted In 1987 Are Un-Preempted in 1999.

Petitioners note that Congress enacted legislation in 1991 requiring airbags in all cars beginning in 1997. P. Br. at 45. Therefore, petitioners say, an award rendered in 1992 requiring airbags in all cars would not frustrate FMVSS 208's policy determination not to require airbags in all cars, and instead provide options, in 1984-91. Consequently, petitioners posit, while a state standard requiring airbags in all cars may have been preempted from 1984-91, it was retroactively un-preempted by 1992. This car was built in 1987, but this crash occurred in 1992. Therefore, petitioners conclude, Honda had a retroactively un-preempted state-law duty in 1992 to install an airbag in this car in 1987, although, since any state standard imposing such a duty was preempted in 1987, Honda could not have had any such duty then.

Petitioners cite no authority to support that, if we may say so, outlandish theory, and we know of none. How could there be? The State could not punish the manufacturer in 1987 for not installing airbags in 1987. Punishing the manufacturer five years after the fact for not discharging a duty it didn't have five years before and couldn't discharge five years later just makes the punishment immoral as well as illegal. In any case, the 1991 legislation petitioners argue changed the law expressly did not, much less retroactively. Congress specified that its 1991 legislation prospectively requiring airbags "shall" not be construed to affect the preexisting preemption law in any way. Pp. 10-11, above.

In sum, petitioners' proposed state common-law rule requiring airbags would "disserve safety" and undermine the regulatory scheme, and so conflict with federal law.

3. The Supremacy Clause Preempts "By Direct Operation" This Conflicting State Law.

"Conventional conflict pre-emption principles require pre-emption where compliance with both federal and state regulations [1] is a physical impossibility, . . . *or* [2] where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (internal quotation marks and citation omitted) (emphasis added). Where either is found, preemption is "require[d]." *Id.* at 844. Here, there is an actual conflict, so preemption is required.

Petitioners and their amici try to avoid that time-honored rule by presumption and abandonment. Neither works.

a. Avoidance By Presumption.

Petitioners and their amici repeatedly invoke the so-called presumption against preemption. This Court has certainly recited there is such a presumption, and has used it in unclear cases to reject express or field preemption arguments. *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664-65, 668 (1993) (express); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (express); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-152 (1963) (field). Thus, ATLA notes that "the scope of express preemption is to be narrowly construed consistent with the strong presumption against preemption." ATLA Br. at 10.

Where state law actually conflicts with federal law, however, the case is clear, and there is no room for presumptions. State law that conflicts with federal law "is pre-empted by direct operation of the Supremacy Clause." *Brown v. Hotel & Restaurant Employees and Bartenders Int'l Union*, 468 U.S. 491, 501 (1984); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 594 (1987) ("traditional pre-emption analysis . . . requires an actual conflict between state and federal law, *or* a congressional expression of intent to pre-empt") (emphasis added). *See also Cipollone*, 505 U.S. at 516 (state law that conflicts with federal law "is 'without effect.' ") (citation omitted); *Ouellette*, 479 U.S. at 491 (state law

"invalid to the extent that it 'actually conflicts with . . . a federal statute' "); *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981) ("a state statute is void to the extent it conflicts with a federal statute"); *Kalo*, 450 U.S. at 317 ("a court *must* find local law pre-empted by federal regulation *whenever* the challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (citation and quotation marks omitted); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978) ("a state statute is void to the extent that it actually conflicts with a valid federal statute"); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141, 146-47 (1963) (only after determining no conflict exists does court "turn to the question whether Congress has nevertheless ordained that the state regulation shall yield").

Petitioners protest that tort law is important to the states. But " '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' " *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. at 666). That rule is nearly as old as the republic. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824). *Accord Gade v. National Solid Waste Mgt. Ass'n*, 505 U.S. 88, 108 (1992) ("under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield") (internal quotation marks omitted); *DeCanas v. Bica*, 424 U.S. 351, 357 (1976): ("[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation.").

Petitioners cannot avoid conflict preemption by presumption.

b. Avoidance by Abandonment.

Next, petitioners propose that the settled law be abandoned, or disregarded, in these ways:

i. The Proposal That "Impossibility" Be The Only Test.

Petitioners and their amici propose that " 'obstacle' pre-emption is not appropriate to deny tort remedies traditionally available under state law"; only impossibility is. ATLA Br. at 26; Mo. Br. at 19-20; AIEG Br. at 11.

But the Court has repeatedly held that the obstacle pre-emption test applies to state common law as to any other. *See, e.g., Medtronic*, 518 U.S. at 496; *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995); *Ouellette*, 479 U.S. at 493-94; *Silkwood*, 464 U.S. at 248; *Kalo*, 450 U.S. at 317; *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446-47 (1907). If anything, the test applies *a fortiori* to common law:

> The effects of the state agency regulation and the state tort suit are identical. To distinguish between [them] for pre-emption purposes would grant greater power to a single state jury than to state officials acting through state administrative or legislative lawmaking processes.

Medtronic, 518 U.S. at 504 (Breyer, J., concurring).[14]

ii. The Proposal That A Benign State Purpose Eliminates Conflict.

Petitioners argue that their proposed state common-law duty to install airbags would serve safety. But NHTSA and DOT disagree: They concluded that mandating airbags or any other passive restraint would "disserve safety." In any case, "it is not enough to say that the ultimate goal of both federal and state law is [the same]. A state law also is pre-empted if it interferes with the methods by which Congress intended to meet [its goal]." *Ouellette*, 479 U.S. at 494; p. 14, above.

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[14] Indeed, petitioners' amici disprove petitioners' remove-one-test theory. They concede that an injunction requiring airbags, although based on common-law, "would clearly be preempted." ATLA Br. at 6. That injunction, however, would not make it impossible to comply with both federal and state law, but, like petitioners' damage claim, would necessarily be preempted under the (supposedly removed) obstacle test.

iii. The Proposal That NHTSA Cannot Preempt, Or Can Only Preempt Expressly.

Petitioners and their amici argue that NHTSA had no power to preempt, or at the least, that a preempting agency standard must state on its face the agency's intent to preempt. Of course, then the standard would expressly, not impliedly, preempt. There is no rule that federal regulations cannot impliedly preempt. To the contrary. An agency exercising its delegated authority has the same preemptive power as Congress. *City of New York v. Federal Communications Comm'n*, 486 U.S. 57, 63-64 (1988). Moreover, the preemptive "force" of an agency's regulations "does not depend on express congressional authorization to displace state law." *Id.* at 64 (quoting *de la Cuesta*, 458 U.S. at 154). That force comes from the Supremacy Clause. *Id.*; *Lincoln Sav. & Loan Ass'n v. Federal Home Bank Bd.*, 856 F.2d 1558, 1560 (D.C. Cir. 1988) (agency "regulations will preempt inconsistent state [law] by the simple operation of the Supremacy Clause.").

Petitioners complain that NHTSA gave no notice that FMVSS 208 might preempt conflicting state law. P. Br. at 40. But the Supremacy Clause gives notice that federal law preempts conflicting state law. *See, e.g., United States v. Shimer*, 367 U.S. 374, 381-82 (1961) (no express agency intent to preempt; preemption found).

iv. The Proposal That Preemption Cannot Take Away A Remedy.

Petitioners and their amici complain that preemption of "no airbag" claims would leave them "without a remedy for injuries caused by the automaker's unreasonable behavior," NCSL Br. at 12-13. But a manufacturer who does what federal law authorizes and encourages does not behave unreasonably. Thus, petitioners are not complaining that they have no remedy; they are complaining that as a matter of federal policy there is no wrong. Nor does *Silkwood* help; there was no conflict between federal and state law there.

Petitioners in fact had a remedy,[15] but it would not be unique if they were left without one. Every time a conflicting state-law claim is preempted, plaintiff necessarily is left without the remedy the preempted law provided. That is what preemption means. *See, e.g., Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 535 (1959); *Ouellette*, 479 U.S. at 497 (Clean Water Act preempts non-source-state common-law remedies and all common-law remedies where source state provides none); *Garmon*, 359 U.S. at 246-47 (National Labor Relations Act preempts damage claim even when NLRB declines jurisdiction over the matter).

In sum, petitioners' claim conflicts with federal law and is preempted by direct operation of the Supremacy Clause.

C. The Meaning Of Section 1397(k).

Petitioners argue that § 1397(k), the supposed "savings clause," "saves *all* common law claims," including claims – like theirs – that conflict with federal law. P. Br. 34, 39 (emphasis added). That is an extreme contention. In all of U.S. history this Court has never held that any savings clause – even one clearly directed at preemption – preserves claims that actually conflict with the statute that contains the clause. To the contrary, this Court has held exactly the opposite for almost a century. Pp. 28-30, below.[16] Congress could not have intended to give states unlimited power to adopt common-law

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[15] Federal law expressly does not preempt state-law claims implementing the federal standards, 15 U.S.C. § 1392(d), and does not impliedly preempt non-conflicting claims. As ATLA points out, plaintiffs had a claim they could have made; "according to the complaint, . . . the seat itself broke away from its moorings due to inadequate design." ATLA Br. at 8. Plaintiffs cannot invoke a claim federal law prohibits because they waived a claim that federal law allows.

[16] Indeed, the thesis unwinds on itself. For as petitioners' amici admit, § 1397(k) could not save a state claim where it would be impossible to comply with both federal law and the common-law standard the claim seeks to enforce. AIEG Br. at 11; Leflar Br. at 14. Thus they agree that § 1397(k) really does not and cannot bar implied preemption.

rules that directly conflict with the Safety Act, the regulations under it, and the safety purposes those regulations serve – and so invite the chaos the Act was meant to avoid.

Section 1397(k) really has nothing to do with preemption, Part 1, below; at most serves to negate federal occupation of the field, Part 2, below; and certainly does not save claims that actually conflict with the Act that contains the clause, Part 3, below.

1. Section 1397(k), Fairly Read, Has Nothing To Do With Preemption.

Section 1397(k) provides that "compliance" with federal standards "does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). Compliance has nothing to do with preemption, and vice versa: Federal law preempts or not, by operation of federal law, regardless of compliance, and non-compliance cannot by private unilateral action un-preempt. *See AT&T v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) ("It is the Communications Act that renders the promises of preferences unenforceable"; thus private action in a tariff "cannot be construed to do what the parties have no power to do" under the Act).

Compliance with standards is a defense or not to a tort claim, as the substantive tort law provides. Petitioners' amici prove the point. "It is a widely accepted principle of tort law," they say – not preemption law – "that 'Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence when a reasonable person would take additional precautions.' " ATLA Br. at 13; *see* Mo. Br. at 16, n.5 ("For a hundred years courts have considered axiomatic the principle that, against possible liability in tort, a defendant's compliance with governmental statutes and regulations is admissible only as evidence of the defendant's exercise of due care," not a complete defense.). As ATLA says, when Congress enacted the Safety Act, "Congress may be assumed to be familiar with these common-law principles of ordinary tort litigation." ATLA Br. at 13.

Thus § 1397(k)'s plain language (and structure, *see* Brief of Respondent American Honda Motor Co.; Brief of Amicus Curiae Product Liability Advisory Council), axiomatic tort law principles, and Congress' knowledge of them show the way to Congress' intent: to preserve state substantive state tort rules regarding the effect of compliance with federal standards as a defense on the merits to state tort claims, "not to preserve common law claims when they conflict with NHTSA standards." *Gracia v. Volvo Europa Truck, N.V.*, 112 F.3d 291, 298 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 697 (1998).

The legislative history is in accord. Petitioners and their amici cite no legislative statement that even suggests Congress intended by § 1397(k) to save conflicting state claims. And in fact, the history does not "specifically address[ ] the status of conflicting design standards established through the mechanism of common law [design] suits. . . . " *Wood*, 865 F.2d at 406. *See Pokorny*, 902 F.2d at 1123-25; *Taylor*, 875 F.2d at 826-27.

To the contrary, the legislative history – like the clause's express terms – does not speak to preemption at all, but simply opposes federalizing substantive tort principles. For example, the history recites that "[n]o *rules of evidence* are intended to be altered by this provision," and that "proof of compliance with Federal standards may be offered in any proceeding for such *relevance and weight* as courts and juries may give it." 112 Cong. Rec. 21487, 21490 (1966) (emphasis added). Preemption is not a matter of "rules of evidence" or "relevance and weight"; a tort-law compliance defense is. *See* Leflar Br. at 6 ("the comment of Congress assumed the continued existence of state tort law, including the traditional doctrine that compliance with government safety standards constitutes *nonconclusive* evidence of due care.").[17]

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[17] Mr. Triplett (a personal injury lawyer, not a legislator), whose testimony petitioners and their amici embrace (*see, e.g.*, P. Br. at 29, AIEG Br. at 12-14; ATLA Br. at 22), is also in accord. *See* Brief of Respondent. Petitioners also quote Congressman Dingell's statement that the Safety Act "preserved every single common-law remedy." P. Br. at 30-31. But in context, "Dingell's remarks refer to state tort suits which enforce federal standards, not to suits which would create different standards." *Wood*, 865 F.2d at 407 n.14.

But, petitioners complain, that "it would have made no sense for Congress to . . . negat[e] the state law defense of compliance with federal safety standards [because] . . . it was already the law in every state that compliance with a federal regulation is *not* an absolute defense. . . . " P. Br. at 27, n.11. Petitioners' amici prove that false: "Some jurisdictions go further and mandate that compliance with such standards is a conclusive defense to tort liability; establishes a rebuttable presumption of non-negligence; or bars punitive damages." St. Br. at 16 (footnotes omitted); Leflar Br. at 20-21. Anyway the argument misses the point: Congress wanted to make clear that the states' rules on the compliance defense – whatever they were, uniform or not – were unaffected.

Petitioners' early Safety Act cases also are in accord. Petitioners say those cases speak to preemption and find none, but they do not; "the issue of implied preemption was never argued or addressed" in them. *Wood*, 865 F.2d at 417. Rather, those cases give § 1397(k) exactly the tort-law significance its language, structure and history counsel: to negate a federal compliance "defense on the merits," a "distinct" and "entirely different" issue from preemption. *Id.* at 417. *See Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *Schwartz v. American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Fox v. Ford Motor Co.*, 575 F.2d 774, 784-85 (10th Cir. 1978); *Knippen v. Ford Motor Co.*, 546 F.2d 993, 1000 (D.C. Cir. 1976); *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1198 (Ala. 1985), *overruled on other grounds*, 554 So.2d 927 (Ala. 1989); *Volkswagen of America, Inc. v. Young*, 321 A.2d 737, 746 (Md. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 345 N.E.2d 683, 688 (Mass. 1976).[18]

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[18] Those cases also answer petitioners' protest that "there could be no affirmative defense of compliance with a federal standard that" is not on

In sum, § 1397(k) preserves state-law rules regarding compliance as a defense. It does not speak to preemption, much less save conflicting state common-law claims from preemption.

2. Even If Directed At Preemption, Section 1397(k) Simply Negates Field Preemption.

"Savings clauses" directed at preemption traditionally serve a special function: to make clear Congress' intent not to "occupy the field," and thus to save all claims that do not conflict with federal law, but not those that do. *Ouellette*, 479 U.S. at 492 ("the saving clause negates the inference that Congress 'left no room' for state causes of action"); *Kalo*, 450 U.S. at 328 (savings clause included because without it, "it might have been claimed that, Congress having entered the field, the whole subject . . . had been withdrawn from the jurisdiction of the state courts") (quotation marks omitted); *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915) (savings clause included "to preserve all existing rights which were not inconsistent with those created by the statute"). If directed at preemption at all, § 1397(k) serves that function.

Thus the legislative history shows that Congress did not intend to shield manufacturers from "broad" liability, and that compliance with federal standards would "not *necessarily* shield any person from product liability at common law." *See* P. Br. at 29 (citing and quoting 112 Cong. Rec. 14230 (1966) and S. Rep. No. 89-1301 at 12 (1966)); AIEG Br. at 12. Those statements, if addressed to preemption at all, comport with Congress' usual intent in enacting general savings clauses: to make clear that an Act does not occupy the field – does not "necessarily" preempt "broad" common-law liability. They do

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point, so § 1397(k) could not apply in that setting. Pet. Br., p. 26. But in all those cases, there was no on-point federal standard, and the courts found that § 1397(k) applied. Also, there being no on-point standard, there was no conflict; that is why preemption was not in issue.

not speak to conflicting state claims at all, much less reflect some extraordinary intent to preserve them.

The "traditional purpose" reading is likewise supported by petitioners' other Safety Act cases. They found that § 1397(k) made clear that the automotive safety standards field was not occupied. *Buccery v. General Motors Corp.*, 60 Cal. App. 3d 533, 540-41 (1976); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968); *Arbet v. Gussarson*, 225 N.W.2d 431, 438 (Wis. 1975); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1980); *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 654, 656 (5th Cir. 1981), *as modified*, 670 F.2d 21, 673 F.2d 911 (1982); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983). The Third Circuit had no difficulty harmonizing its decision in *Dawson* (giving the savings clause that reading) with its decision in *Pokorny*, 902 F.2d at 1121 (finding "no airbag" claims conflicting and so preempted). Indeed, petitioners' amici, citing those cases, note that before the "no airbag" litigation, "not one appellate court . . . had ever entertained the notion that Congress chose to preempt common law liability in the *field* of motor vehicle product design." AIEG Br. at 4 (emphasis added).

But, petitioners continue, the "preemption provision cannot be read to give rise to any broader 'field' preemption of matters not regulated by the federal agency. Accordingly, there would be no reason for the savings clause to . . . affirmatively negate . . . broader field preemption." P. Br. at 28. Petitioners mistake the law. Field preemption turns on the Act's subject matter, purpose, and pervasiveness, not just a provision's words. *See Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 612-13 (1926). Petitioners also prove too much. If the preemption clause clearly excludes from preemption matters not covered by it, and, as petitioners argue, clearly excludes common-law claims, then § 1397(k) is redundant if it is read to address preemption *at all*.

In any case, it certainly does not save state claims that actually conflict with federal law. We turn to that.

3. Even If Directed At Preemption, Section 1397(k) Does Not Save Conflicting Claims.

This Court has never read a general savings clause to preserve claims that actually conflict with the Act that contains the clause. To the contrary, even when an Act has no preemption clause, a general savings clause cannot save state law that conflicts with the Act. *Abilene*, 204 U.S. at 446, lays down the principle. There, a general savings clause purported to save "the remedies now existing at common law or by statute." Nonetheless, this Court held an existing but conflicting common-law claim preempted, because a savings clause "cannot in reason be construed as continuing . . . a common law right . . . absolutely inconsistent with the provisions of the act." *AT&T*, 524 U.S. at 227-28 (savings clause "preserved only those rights that are not inconsistent with the statutory filed-tariff requirements," citing *Abilene*); *Morales*, 504 U.S. at 384-85 (clause saved "the remedies now existing at common law or statute"; a "general 'remedies' savings clause cannot be allowed to supersede the specific substantive pre-emption provisions," and "we do not believe Congress intended to undermine this carefully drawn statute through a general saving clause") (citation and quotation marks omitted); *Ouellette*, 479 U.S. at 493-94, 505 (savings clause provided "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law"; Senate Report said "[c]ompliance with . . . Act would not be a defense to a common law action for . . . damages"; conflicting common-law claims preempted because Congress could not have "intended to undermine . . . [the Act] through a general savings clause"); *Kalo*, 450 U.S. at 328 (clause providing nothing in Act "shall in any way abridge or alter the remedies existing at common law or by statute" did not save conflicting common-law damage claim); *see also John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 99 (1993) (saved state law "generally is not displaced," but is " 'where [it] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.' ").

The rule also makes good practical sense. Congress cannot foresee all the ways that state law might some day conflict with Congress' purposes. *Accord*, AIEG Br. at 18. Nothing permits one to assume that Congress would be so rash or cavalier as to discard the Supremacy Clause, and so accord conflicting state laws carte blanche to undermine Congress' legislation, all through a general savings clause that does not and cannot take into account whatever future conflicts may come to be. In fact, the law assumes the opposite. Congress' "purpose" to preempt is "evidenced," among other ways, by the mere fact that "state policy may produce a result inconsistent with the objective of the federal statute." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

But, petitioners argue, "Section 1397(k) is not a 'general savings clause.' It specifically addresses and preserves from federal preemption one aspect of state law: common law liability." P. Br. at 27. That, with respect, is a word game. A general savings clause is "general" because it generally saves claims in some field – say common law, or insurance law – but does not speak to specific laws within the field that may conflict with federal law some day; Congress will not be understood to have saved a specific conflicting law that it did not address. Thus in *John Hancock*, the saved field was very narrow: "any law . . . which regulates insurance, banking, or securities." Nevertheless, the Court held that conflicting state laws within the field were not saved. 510 U.S. at 99. *See also Morales*, 504 U.S. at 384-85 (applying *Abilene* principle to ERISA savings clause).

Indeed, petitioners' specific/general dichotomy reduces to absurdity. The notion is that the broader the savings clause, the less it saves, and the narrower the clause, the more it saves. Why would that be?

The *Abilene* principle has been the law throughout this century, and Congress is presumed to know about it and legislate in light of it. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988); *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979). Reading this clause in light of that principle, and assuming the clause is directed at

preemption, it saves all claims that do not conflict with the Safety Act and the regulations under it, but not those that do. Accordingly, § 1397(k) would save all claims that do not conflict with an FMVSS: claims based on manufacturing defects; claims based on state standards concerning aspects of performance not covered by federal standards; and claims based on state standards concerning aspects of performance that are covered by federal standards, but do not conflict with those federal standards. That is most claims.

But claims that actually conflict with federal law, though rare, are not saved. This is that rare claim. It is preempted.

CONCLUSION

The Court should affirm the decision of the District of Columbia Circuit.

DATED: November 18, 1999.

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ALEXIS GEIER, ET AL.,

Petitioners,

v.

AMERICAN HONDA MOTOR CO., INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1988), and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (1987), preempt a state common-law tort claim that an automobile manufactured in 1987 was defectively designed because it did not contain an air-bag.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of nearly three million businesses and organizations, with 140,000 direct members, in every size, sector, and geographic region of the country. The Chamber has filed numerous *amicus* briefs in this Court on the subject of federal preemption. *See, e.g., United States v. Locke*, Nos. 98-1701 and 98-1706 (*amicus* brief filed Oct. 22, 1999); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *Wisconsin Dep't of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282 (1986).

STATEMENT

1. The National Traffic and Motor Vehicle Safety Act of 1966, as amended, 15 U.S.C. §§ 1381 *et seq.* (1988) (the "Act"),[2] requires the Secretary of Transportation to promulgate federal motor vehicle safety standards. The Act includes a preemption provision that precludes states from establishing or continuing in effect

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[1] Pursuant to this Court's Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for both petitioners and respondents have consented to the filing of this amicus brief in letters that have been lodged with the clerk.

[2] The Act was amended and recodified without substantive change in 1994. Pub. L. No. 103-272, 108 Stat. 745. The court below and the parties have continued to refer to the earlier version of the Act, so for sake of clarity amicus will adhere to that same practice.

"any safety standard" that is not "identical to" an existing federal motor vehicle safety standard applicable to the same aspect of motor vehicle performance. 15 U.S.C. § 1392(d).

Pursuant to the Act, the Secretary has set forth uniform federal standards for motor vehicle occupant crash protection in Federal Motor Vehicle Safety Standard 208. *See* 49 C.F.R. § 571.208. The version of Standard 208 at issue in this case was promulgated by the Secretary in 1984. During the time period relevant to this case, Standard 208 authorized motor vehicle manufacturers to achieve the requisite level of motor vehicle safety without providing airbags in every motor vehicle. 49 C.F.R. § 571.208.S4.1.3.1. Instead, Standard 208 directed manufacturers to install a passive restraint system of some type in 10 percent of cars manufactured in the relevant model year, and gave manufacturers the right to select a variety of passive restraint systems—including but not limited to airbags—in order to satisfy this requirement. *Id.* The Secretary expressly refused to require manufacturers to include airbags in all cars, noting a number of safety, economic, technological, and practical goals that would be frustrated by imposition of such a requirement at that time. 49 Fed. Reg. 28,962, 29,000-02 (1984).

2. Alexis Geier was injured when she lost control of the 1987 Honda Accord she was driving and crashed into a tree. She and her parents, petitioners herein, brought suit against respondents claiming that the Honda Accord was defective because it did not contain an airbag.

The United States District Court for the District of Columbia granted respondents' motion for summary judgment and dismissed petitioners' complaint. The court ruled that petitioners' theory of liability was expressly preempted by the Act's preemption provision, 15 U.S.C. § 1392(d), and by Standard 208. *See Geier v.*

American Honda Motor Co., 166 F.3d 1236, 1238 (D.C. Cir. 1999).

The United States Court of Appeals for the District of Columbia Circuit affirmed. The court noted that "[t]he language of § 1392(d) is fairly sweeping" and that "[o]n its face, . . . the term 'standard' in § 1392(d) could apply to the requirements imposed by common law tort verdicts." 166 F.3d at 1240. The court declined to decide whether petitioners' claim was expressly preempted, however, noting that the Act contains a so-called "savings clause" providing that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k); *see* 166 F.3d at 1241.

Instead, the court of appeals joined several of its sister circuits in concluding that petitioners' cause of action was impliedly preempted because "a verdict in her favor would stand as an obstacle to the federal government's chosen method of achieving the Act's safety objectives." *Id.* As the court explained, "[a] successful no-airbag claim would mean that an automobile without an airbag was defectively designed. Congress, however, delegated authority to prescribe specific motor vehicle safety standards to the Secretary of Transportation, who in turn explicitly rejected requiring airbags in all cars on the ground that a more flexible approach would better serve public safety." *Id.* at 1242 (citation omitted). Thus, the court concluded, "allowing design defect claims based on the absence of an airbag for the model-year car at issue would frustrate the Department's policy of encouraging both public acceptance of the airbag technology and experimentation with better passive restraint systems." *Id.* at 1243. Accordingly, petitioners' claim was implicitly preempted. *Id.*

SUMMARY OF ARGUMENT

I. The Act preempts "any" state-imposed "safety standard" that is not "identical to" an existing federal motor vehicle safety standard relating to the same aspect of motor vehicle performance. 15 U.S.C. § 1392(d). Petitioners err in contending that this provision is inapplicable to standards imposed through common-law adjudication.

In the first place, this Court has repeatedly recognized that state common-law suits impose legal rules and standards that have the same regulatory effect as legislative or administrative pronouncements. Thus, this Court has concluded that common-law suits fall within the scope of preemptive provisions that refer to "requirements," "laws," "standards," and the like. The same conclusion is equally appropriate here.

In addition, common sense and experience confirm that state-law tort suits result in the imposition of safety standards on industry. Applying modern tort-law doctrines, state courts and juries have repeatedly imposed liability for products' failures to meet specific safety-related criteria. As even a limited sampling of the case law demonstrates, there are countless cases in which state courts have imposed or authorized findings of liability based on a product's inability to satisfy particular performance standards or design criteria imposed by the common law. The simple truth is that state courts and juries are adopting and enforcing an ever-widening array of performance and design standards through the mechanism of common-law adjudication, and thus it is readily apparent that state-law tort suits like this one lead to the establishment of "safety standard[s]." Petitioners' suit plainly seeks to establish a "safety standard" that is not identical to the standard set forth in Standard 208, and it is therefore expressly preempted by § 1392(d).

II. Petitioners' suit is also impliedly preempted because, as the court of appeals correctly held, permitting

tort plaintiffs to subject manufacturers to liability for failing to install airbags would frustrate the regulatory goals that the Secretary of Transportation sought to achieve in promulgating Standard 208. Petitioners contend that implied preemption analysis is unavailable in this case because the Act contains an express preemption provision and a so-called "savings clause," but petitioners' argument is without merit, for two reasons.

First, this Court's precedents make clear that implied conflict preemption analysis is entirely appropriate in these circumstances. Petitioners rely on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), but that case announces no prohibition against resort to implied preemption analysis under statutes containing express preemption clauses, and numerous precedents of this Court preclude adoption of any such rule. Equally flawed is petitioners' reliance on § 1397(k), the so-called "savings clause." This Court has consistently held that even the existence of a true savings clause does not obviate the need for implied conflict preemption analysis, because such clauses "'cannot in reason be construed as continuing . . . a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.'" *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (quoting *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)).

Second, persuasive considerations of public policy compel rejection of the arguments advanced by petitioners and their amici, which would largely eviscerate the doctrine of implied preemption as it has been recognized and applied by this Court. Petitioners and their amici offer no justification for so dramatic a departure from the current understanding of federal-state relations. If anything, recent trends in state tort law demonstrate an *enhanced* need for vigorous enforcement of implied preemption principles in order to shield our national economy from the increasing burdens placed upon it by un-

constrained, arbitrary, inconsistent, and excessive tort verdicts and liability rules. The same considerations that impelled the Framers of our Constitution to grant Congress the power to regulate interstate commerce and preempt burdensome state economic regulations now compel redoubled vigilance in judicial enforcement of implied preemption doctrine, which is necessary to ensure that the states do not impose undue burdens on interstate commerce through their common-law tort systems, particularly in instances where, as here, Congress or the responsible federal agency has already spoken by adopting a uniform national standard.

ARGUMENT

I. PETITIONER'S SUIT IS EXPRESSLY PREEMPTED BECAUSE IT SEEKS TO IMPOSE A "STANDARD" DIFFERENT FROM THAT IMPOSED BY FEDERAL LAW

The National Traffic and Motor Vehicle Safety Act of 1966 requires the Secretary of Transportation to establish "appropriate Federal motor vehicle safety standards" for "motor vehicle performance . . . which [are] practicable, which meet[] the need for motor vehicle safety and which provide[] objective criteria." 15 U.S.C. §§ 1391(2), 1392(a). The Act expressly mandates federal preemption of any state-law "safety standard" that is not identical to an existing Federal standard applicable to the same aspect of performance:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.

15 U.S.C. § 1392(d).

Petitioner contends (Pet. Br. 18-25) that this express preemption provision does not apply to common law rules that have the effect of regulating motor vehicle safety, but is instead limited to legislative or administrative pronouncements. As demonstrated below, however, this argument is without merit. Both precedent and practical experience demonstrate convincingly that common-law adjudication imposes "safety standard[s]" to the same extent as other forms of state regulation.

A. Precedent Demonstrates That State Court Adjudication Establishes "Standards"

This Court has repeatedly recognized that state common-law suits are appropriately subjected to the same preemption analysis as state statutes or administrative regulations under express preemption provisions analogous to § 1392(d), because common-law adjudication results in the imposition of legal rules and standards that have the same regulatory impact as legislative or administrative pronouncements. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), for example, five Justices of this Court concluded that common-law suits are subject to preemption analysis under a federal statute preempting "any requirement" imposed by a "State or political subdivision" that is "different from, or in addition to," any requirement imposed by the federal regulatory scheme. 21 U.S.C. § 360k(a); *see* 518 U.S. at 504 ("One can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law.") (Breyer, J., concurring in part and concurring in the judgment); *id.* at 509 ("state common-law damages actions do impose 'requirements' and are therefore preempted where such requirements would differ from

those imposed by the [federal regulatory scheme]") (O'Connor, J., concurring in part and dissenting in part).

Similarly, in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), six Justices concluded that a statute preempting certain "requirement[s] or prohibition[s] . . . imposed under State law" was fully applicable to common-law actions. *Id.* at 520-23 (opinion of Stevens, J.); *id.* at 548-49 (Scalia, J., concurring in the judgment in part and dissenting in part). The plurality explained that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules." *Id.* at 521 (opinion of Stevens, J.). Indeed, as the plurality noted, "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, and indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Id.* (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). *Accord, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) ("Legal duties imposed . . . by the common law fall within the scope of" statute preempting any state "law, rule, regulation, order, or *standard* relating to railroad safety") (emphasis added); *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991) (statutory provision preempting "'the antitrust laws and all other law, including State and municipal law,'" did "not admit of [any] distinction . . . between positive enactments and common-law rules of liability").

These cases confirm that § 1392(d) must be construed in accordance with its plain language to encompass safety standards imposed by state tort law. Like the terms "requirement," "prohibition," "law," and "standard" at issue in the foregoing cases, the phrase "any safety standard" as used in § 1392(d) is broad and all-

encompassing, and plainly extends to standards imposed by common-law adjudication as well as those imposed by legislatures or administrative agencies.

B. Common Sense And Experience Confirm That State Court Adjudication Establishes "Standards" That Industry Must Satisfy Or Face Potentially Crushing Liability

Common sense and recent experience confirm that common-law adjudication results in the imposition of safety standards and that federal preemption of such standards is therefore mandated by § 1392(d). Under the rubric of risk-utility analysis or "unreasonable dangerousness" tests, state courts and juries have repeatedly demonstrated their power to impose liability on manufacturers and sellers based upon a product's failure to satisfy specific safety-related criteria. Manufacturers and sellers have been found liable for a wide variety of such product "defects."

State courts and juries frequently impose strict liability on the basis of particular performance standards imposed retroactively by operation of the common law. For example, the Texas courts upheld a jury verdict finding an aircraft manufacturer liable for the deaths of two individuals caused when their seats broke loose during a plane crash. *See Duncan v. Cessna Aircraft Co.*, 632 S.W.2d 375 (Tex. App. 1982), *rev'd in part on other grounds by Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984), and *Smithson v. Cessna Aircraft Co.*, 665 S.W.2d 439 (Tex. 1984). This holding was premised on a determination that the seat legs should have been designed to withstand 25 G's, but were only one-fifth that strong. 632 S.W.2d at 382-83. Equally specific performance standards have been im-

posed in countless other cases by virtue of state tort law.[3]

Similarly, state courts frequently impose liability on manufacturers for failure to satisfy specific design criteria purportedly necessary to achieve the requisite level of safety demanded by state tort law. In *Dallas v. F.M. Oxford Inc.*, 552 A.2d 1109 (Pa. Super. Ct. 1989), for example, a Pennsylvania state appellate court upheld a jury verdict imposing liability on an elevator manufacturer for injuries caused by an elevator door. The liability determination rested on the proposition that elevator doors must have photoelectric cells, rather than simply rubber "safety edges," to make them retract when an object comes between the doors. *Id.* at 1110, 1113. Similarly, in *Hopper v. Crown*, 646 So. 2d 933 (La. Ct. App. 1994), a Louisiana state appellate court upheld a jury verdict against a forklift manufacturer. The company's forklift design was declared defective because the partially enclosed driver's compartment had no door in the back to keep a standing driver from being ejected during a collision. *Id.* at 946. Numerous other courts have imposed or upheld equally specific safety-related

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3 *See, e.g., Joe Sartain Ford, Inc. v. American Indem. Co.*, 399 So. 2d 281 (Ala. 1981) (a truck's oil line should be made of metal rather than neoprene), *overruled in part on other grounds by Lloyd Wood Coal Co. v. Clark Equip. Co.*, 543 So. 2d 671 (Ala. 1989); *Selmo v. Baratono*, 184 N.W.2d 367 (Mich. Ct. App. 1970) (a car's bumper brackets should be suitable for use in towing the car); *Hancock v. Paccar, Inc.*, 283 N.W.2d 25 (Neb. 1979) (a truck's bumper should be strong enough not to bend back and obstruct a wheel upon severe impact); *Dura-Stilts Co. v. Zachry*, 697 S.W.2d 658 (Tex. App. 1985, writ ref'd n.r.e.) (the aluminum alloy used to make stilts should be strong enough to support a foreseeable weight).

design requirements in a wide array of product liability cases.[4]

The simple truth is that state court judges and juries have been adopting and enforcing an ever-widening array of performance and design standards applicable to countless products. Thus, there is no merit to petitioners' contention that state-law tort actions like this case do not lead to the imposition of "safety standards" on industry.

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4 *See, e.g., Widson v. International Harvester Co.*, 200 Cal. Rptr. 136 (Ct. App. 1984) (an earth mover should have an audible device to warn that it is backing-up); *Camacho v. Honda Motor Co.*, 741 P.2d 1240 (Colo. 1987) (en banc) (a motorcycle should have leg-protection devices); *Nicolodi v. Harley-Davidson Motor Co.*, 370 So. 2d 68 (Fla. Dist. Ct. App. 1979) (same); *Cox v. R.O. Corp.*, 470 So. 2d 790 (Fla. Dist. Ct. App. 1985) (a truckbed-mounted crane should have an audible device to warn that its outriggers are about to deploy); *Watson v. Navistar Int'l Transp. Corp.*, 827 P.2d 656, 675-76 (Idaho 1992) (a four-inch gap in a combine's auger cover should be made smaller or guarded); *Simpson v. General Motors Corp.*, 483 N.E.2d 1 (Ill. 1985) (an earth scraper should have a roll bar); *Morales v. American Honda Motor Co.*, 151 F.3d 500, 507 (6th Cir. 1998) (a children's motorcycle should have a safety flag) (applying Kansas law); *Davis v. Commercial Union Ins. Co.*, 892 F.2d 378 (5th Cir. 1990) (a lint-cleaning machine should have interlock device to shut off its rollers when guard is removed) (applying Louisiana law); *Grover v. Grover*, 972 S.W.2d 568 (Mo. Ct. App. 1998) (automobile ramps should have barriers to prevent a vehicle from easily rolling off); *Miller v. Varity Corp.*, 922 S.W.2d 821 (Mo. Ct. App. 1996) (a tractor should have a rollover protection system); *Doty v. Navistar Int'l Transp. Corp.*, 639 N.Y.S.2d 592 (N.Y. App. Div. 1996) (a combine auger should be covered by a guard or have tapered edges and non-protruding screws); *Morgen Indus., Inc. v. Vaughan*, 471 S.E.2d 489, 492 (Va. 1996) (a conveyor belt should have wheel guards at the nip points).

Petitioners' amici protest that a single tort plaintiff's success in court does not translate into a standard because "it does not relieve any subsequent plaintiff of the burden of proving each element of their causes of action." Br. Amicus Curiae of Ass'n of Trial Lawyers of America at 7. But that argument simply ignores reality. In the first place, principles of stare decisis and respect for precedent generally mean that one appellate court's decision upholding liability based on a particular purported defect or flaw potentially will be followed in future cases. Moreover, one success—or even potential success—by plaintiffs' lawyers inevitably spawns a host of copycat suits seeking to cash in on the same winning theme, forcing industry to respond to an onslaught of litigation at great cost. *See* Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 442 (1999).

The argument that one plaintiff's success does not translate into a "standard" is further refuted by the fact that, in the wake of this Court's adoption of the doctrine of non-mutual offensive collateral estoppel (*see Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)), nearly 30 states, including the District of Columbia, have adopted some version of that doctrine. *See* 47 AM. JUR. 2D *Judgments* § 647 (1995); *see also* E.H. Schopler, Annotation, *Comment Note: Mutuality of Estoppel As Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment*, 31 A.L.R.3D 1044 §§ 4(c) and 5 (Supp. 1999). As a consequence, individual state tort suits may create the potential for the establishment of de facto regulatory standards that in some circumstances may be binding on the defendant in future cases as well. Moreover, once a single court or jury has deemed a product defective for failing to satisfy a particular design or performance requirement, future plaintiffs will typically rely on that finding as a basis for seeking punitive damages from the manufacturer, on the theory that the prior jury award placed the manufacturer

on "notice" of the "defect." Thus, defendants faced with new court-imposed standards may have little choice but to comply with those standards in order to minimize the burden of still further litigation, punitive damages, and the like.

C. Petitioners' Suit Seeks To Establish A "Standard" That Is Different From Standard 208

For all these reasons, therefore, there is no merit to petitioners' argument that their lawsuit does not seek to impose "any safety standard" within the meaning of § 1392(d). By means of this state-law tort suit, petitioners plainly seek to obtain a judicially binding determination that respondents were obligated to incorporate an airbag into the 1987 Honda Accord. That desired determination is every bit as much a "safety standard" as would be the identical requirement imposed by a state legislature or regulatory agency, and nothing in § 1392(d) differentiates between these different sources of safety standards.

Consequently, petitioners' attempt to avoid express preemption reduces to their argument that the so-called "savings clause" set forth in § 1397(k) requires rejection of the plain language of § 1392(d) in order to immunize all common-law liability rules from express preemption. As Justice Breyer cogently observed when confronted with a similar argument in *Medtronic*, however, "[t]o distinguish between [state agency regulation and state tort-law regulation] for preemption purposes would grant greater power . . . to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." 518 U.S. at 504 (Breyer, J., concurring in part and concurring in the judgment). In the absence of compelling evidence that Congress expressly considered and intended to achieve such an improbable result, there is no justification for construing the Act in this fashion. *See id.* ("Where Congress likely did not fo-

cus specifically upon the matter, . . . I would not take it to have intended this anomalous result.").

As has been ably demonstrated by respondents, § 1397(k) plainly was not intended to achieve the "anomalous result" urged by petitioners. Instead, § 1397(k) (which does not even address the issue of preemption) was intended to ensure that a motor vehicle manufacturer's compliance with federal requirements would not automatically be deemed to establish the affirmative defense of compliance with applicable safety regulations. Thus, contrary to the arguments advanced by petitioners and their amici, § 1397(k) does not trump the plain language of § 1392(d), and petitioners' cause of action is expressly preempted.

II. THE DOCTRINE OF IMPLIED PREEMPTION BARS PETITIONERS' SUIT

Under this Court's precedents, implied conflict preemption will be found "where it is 'impossible for a private party to comply with both state and federal requirements,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citations omitted). As the court below correctly recognized, petitioners' attempt to subject respondent to liability for failing to install airbags in its 1987 Honda Accords would frustrate the regulatory goals sought to be achieved by the Secretary of Transportation in promulgating Standard 208 pursuant to the authority delegated by Congress. *See* 166 F.3d at 1242-43. Accordingly, petitioners' suit is impliedly preempted.

Petitioners contend, however, that the court of appeals "should never have resorted to implied preemption analysis here," because such analysis is allegedly inappropriate when Congress has adverted to the issue of preemption in the statute. Pet. Br. 34-41. As demonstrated below, this Court's precedents compel rejection

of petitioners' contention. Moreover, powerful considerations of public policy confirm the need for implied preemption analysis when, as here, Congress or a federal agency has acted to adopt a uniform federal standard.

A. This Court's Precedents Make Clear That Implied Preemption Analysis Is Appropriate Under Statutes Containing An Express Preemption Provision

In support of their assertion that implied preemption analysis is inappropriate here, petitioners rely primarily on *Cipollone*. In that case, the Court noted that there is no need to infer preemptive intent from a statute's substantive provisions when the statute also contains an express preemption provision that "provides a 'reliable indicium of congressional intent with respect to state authority.'" 505 U.S. at 517. That observation is inapposite here, however, and provides no justification for petitioners' attempt to rewrite preemption law to eviscerate the doctrine of implied conflict preemption.

Contrary to petitioners' apparent belief, *Cipollone* did not purport to preclude implied preemption in instances where the relevant federal statute contains an express preemption clause. Indeed, as the court of appeals recognized (166 F.3d at 1241-42), that reading of *Cipollone* was squarely rejected in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), which held that the argument that implied preemption analysis is unavailable "is without merit." *Id.* at 287. In fact, as the Court in *Freightliner* pointed out (*id.* at 288-89), *Cipollone* itself conducted implied preemption analysis despite the presence of an express preemptive provision (505 U.S. at 518), so *Cipollone* obviously cannot support the weight that petitioners place on it. In short, *Cipollone* does not "obviate the need for analysis of an individual statute's pre-emptive effects," including consideration of implied preemption. *Freightliner*, 514 U.S. at 289 (citing *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673 n.12 (1993)).

Numerous other cases are to the same effect. In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), for example, the Court first considered the express pre-emption provision contained in the Employee Retirement Income Security Act of 1974 (*id.* at 138-42), and then went on to conduct an implied conflict preemption analysis as well (*id.* at 142-45), concluding that "the requirements of conflict pre-emption are satisfied in this case." *Id.* at 145. *Accord, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 540-41, 543 (1977) (Court's determination that state law was not expressly preempted "does not . . . resolve this case, for we still must determine whether the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'") (citation omitted); *see also Medtronic*, 518 U.S. at 503 ("the issue [of express pre-emption] may not need to be resolved if the claim would also be pre-empted under conflict pre-emption analysis") (opinion of Stevens, J.); *CSX Transp.*, 507 U.S. at 673 n.12.

Equally flawed is petitioners' suggestion that the Act's so-called "savings clause" (§ 1397(k)) somehow displaces traditional preemption doctrine and precludes resort to principles of implied conflict preemption. This Court has repeatedly applied conflict preemption analysis despite the presence of even a true savings clause, reasoning that such clauses "'cannot in reason be construed as continuing . . . a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'" *American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (quoting *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)); *see, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 493-94 (1987).

Indeed, this Court has already held that implied preemption analysis is appropriate in circumstances essen-

tially identical to those that, in petitioners' view, are present here. In *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993), the relevant federal statute contained an express preemption provision, but also contained a savings clause that the Court found was directly applicable to the state law at issue. *Id.* at 99. Despite the existence of this facially applicable savings clause, the Court had no difficulty concluding that implied preemption analysis was appropriate; the savings clause provided "no solid basis for believing that Congress . . . intended fundamentally to alter traditional preemption analysis." *Id.* Accordingly, the Court concluded that where a challenged state law "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,'" implied conflict preemption occurs *even if* that state law also falls within the protective ambit of a general savings clause. *Id.* (citation omitted). The same reasoning leads inexorably to the conclusion that implied preemption analysis is appropriate in this case as well, even assuming *arguendo* that Congress intended § 1397(k) to be a savings clause and that it extends to petitioners' claims.

B. The Evisceration Of Implied Preemption Analysis Sought By Petitioners And Their Amici Would Work A Dramatic And Disastrous Shift In The Balance Of State And Federal Power

Not content with petitioners' baseless attempt to pretermit implied preemption analysis in this case, petitioners' amici level an even more sweeping (but equally baseless) attack on the doctrine of implied preemption. They argue that "the scope of implied conflict preemption in products liability cases should be narrowly circumscribed" and "tightly constrained." Br. Amicus Curiae of Robert B. Leflar, *et al.* ("Leflar Br."), at 6, 14. Indeed, these amici assert that implied preemption is altogether inappropriate unless Congress or a federal regulatory agency has expressly dictated that a particular

federal standard "*and no other*" should govern the product at issue. *Id.* at 14 (citation omitted; emphasis added). Adoption of this view, of course, would effectively eliminate implied preemption analysis altogether, because an *express* statement of federal exclusivity would be required before preemption could occur.

Nothing in law or policy supports this proposed drastic restriction of the scope of federal preemption. This Court's well-established preemption case law makes clear that state law is displaced where "Congress intended federal law to occupy a field exclusively," where "it is 'impossible for a private party to comply with both state and federal requirements,'" or where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner*, 514 U.S. at 287. Petitioners and their amici offer no justifications for departing from this well-established line of precedent, nor could they.

If anything, recent developments and trends in state tort law reveal an *enhanced* need for vigorous enforcement of implied preemption principles and related constitutional mandates in order to shield our national economy from the increasing burdens placed upon it by unconstrained, arbitrary, inconsistent, and excessive tort verdicts and ever-expanding liability rules. Indeed, an examination of the rationale for the existence of Congress's power to preempt state economic regulation reveals that it is precisely these types of state-law excesses that justify and require the exercise of preemptive power by Congress and enforcement of that power by the federal courts.

Congress's power to regulate our national economy and preempt undesirable or inconsistent state regulations rests, of course, on the Commerce Clause (in conjunction with the Supremacy Clause). U.S. CONST. art. I, § 8, cl. 3; *id.* art. VI, cl. 2. The historical record clearly reveals that the Commerce Clause was adopted precisely in order to avoid the deleterious effects of excessive, inconsistent, and discriminatory state regulation of interstate commerce in a manner contrary to the interests of the Nation as a whole.

The Articles of Confederation did not confer power over interstate commerce upon the federal government and, as James Madison explained, this "want of a general power over Commerce led to an exercise of this power separately, by the States, w[hi]ch not only proved abortive, but engendered rival, conflicting and angry regulations." 3 RECORDS OF THE FEDERAL CONVENTION, at 547-48 (Max Farrand ed., 1911). The adoption of the Commerce Clause thus "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

In drafting the Commerce Clause, therefore, a central goal of the Framers was to deny States "[t]he opportunities . . . of rendering others tributary to them, by commercial regulations," THE FEDERALIST NO. 7, at 30 (Alexander Hamilton) (Bantam ed. 1982). What the Framers hoped to create was "an unrestrained intercourse between the States themselves [that would] advance the trade of each, by an interchange of their respective productions," and to ensure that "Commercial enterprise [would] have much greater scope" than it had under the Articles of Confederation. THE FEDERALIST NO. 11, at 53 (Alexander Hamilton).

The dramatic transformation of state tort law and practice over the past several decades has given rise to many of the same problems and concerns that originally impelled the Framers to grant control over interstate commerce to the federal government. Tort verdicts readily transmogrify from compensation for individual plaintiffs into edicts that restructure national markets and

industries. The general economic interests of the Nation are increasingly being sacrificed on the altar of the parochial interests of particular states, as declared by local state judges and lay juries.

When dealing with products that move in a national market, individual states simply cannot, as a federalist ideal would suggest, serve as laboratories conducting "economic experiments without risk to the rest of the country," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). To the contrary, the rest of the Nation actually bears the risks of such experiments by individual states. When a state's tort system imposes extra costs by means of stricter liability, often accompanied by draconian awards of punitive damages, manufacturers are forced to spread those costs to the other states in which their products are sold. *See* Michael W. McConnell, *A Choice-of-Law Approach to Products-Liability Reform*, *in* NEW DIRECTIONS IN LIABILITY LAW 90, 92 (Walter Olson ed., 1988). As a result, the effects of even a small minority of states' unduly strict liability standards come to be felt by consumers in all states. They must either pay higher prices or lose the option to buy products that have been withdrawn from the market because potential liability costs or litigation expenses are simply too high.

Thus, given the realities of today's national product markets, the Nation as a whole is increasingly being held hostage to errors made by individual states—or individual juries—in the direction of over-deterrence. Regulation through common-law tort verdicts and court decisions is a particularly problematic mechanism for such over-deterrence, because common-law decisionmaking is notoriously ill-suited to the establishment of nationwide standards that strike the proper balance among the multitude of societal interests at stake in a particular regulatory setting. Common-law adjudication is designed to take account only of the facts of individual cases and is narrowly circumscribed by the nature of the

adversary process, the rules of evidence, and other traditional constraints on judicial decisionmaking. In the minds of local lay jurors and state-court judges, moreover, there is often little contest between sympathy for a local plaintiff and feelings about a wealthy, out-of-state corporate defendant, especially when a skilled plaintiff's attorney tugs on their heartstrings. *See, e.g.*, Richard Neely, THE PRODUCT LIABILITY MESS 10-11 (1988). The inevitable result is over-deterrence as local judges and juries advance parochial local interests at the expense of the Nation's interest in a strong national economy.

When juries do render pro-plaintiff verdicts, moreover, the repercussions are often vastly amplified by the current trends in tort law. This Court scarcely needs to be informed of the increasing use of massive class actions or of the skyrocketing rises in punitive-damages awards. These factors alone catapult state tort systems out of the world of mere compensation in individual cases; even aberrational verdicts can now have crushing effects on manufacturers. In addition, with the liberalization of rules governing personal jurisdiction, venue, *forum non conveniens*, and conflict-of-laws doctrines, plaintiffs can often gain access to those state courts that have the most favorable substantive law. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981) ("Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous."); *see also* Gita F. Rothschild, *Forum Shopping*, 24 LITIGATION 40, 40 (Spr. 1998) ("[T]he expansion of personal jurisdiction in *International Shoe Co. v. Washington*, together with the nationwide business activities of many large enterprises, have increased plaintiffs' forum options and made forum shopping a common practice.") (citation omitted).

Inordinate costs are levied on businesses not only by the imposition of excessive liability in a few states, but also by the proliferation of varying standards in all of the states. Multiple jury verdicts, delivered in multiple jurisdictions, based on disparate standards that take account of different factors, combine with other state and local legislation and regulation to make it difficult to ascertain what the applicable standards are, much less to comply with them all simultaneously. Such unpredictability and inconsistency can stultify economic prosperity as much as the welter of local tariffs the Framers sought to eradicate in 1787.

Given all of these factors, it is not surprising that products are often withdrawn from the market and manufacturers driven into bankruptcy by a tower of lawsuits later seen to be without true foundation—most recently and dramatically in the case of breast implants. *See, e.g.*, David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457 (1999) (reviewing MARCIA ANGELL, SCIENCE ON TRIAL (1996)); Marc M. Arkin, *Products Liability and the Threat to Contraception*, Manhattan Institute Civil Justice Memo No. 36 (Feb. 1999) <http://www.manhattan-institute.org/html/cjm_36.htm> (describing lawsuits that led to withdrawal of Copper-7 IUD from market).

Less apparent, but equally real, are the costs imposed on society by the loss of potentially beneficial products that are never developed, or never released to market, because of concerns about potential liability. *See, e.g.*, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Some manufacturers of prescription drugs . . . have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.") (citations omitted);

Wayne C. Koff, *The next steps toward a global AIDS vaccine*, SCIENCE, Nov. 25, 1994, at 1335 (risk of tort liability is a "significant economic disincentive[]" that has helped lead "some manufacturers to eliminate or scale back AIDS vaccine development").

Every state of the Union suffers these adverse consequences of the current tort system, even if only a relative handful of states is to blame for the over-regulation and over-deterrence resulting from out-of-control tort verdicts and lawsuit abuse. Manufacturers and other businesses releasing their products or services into the stream of commerce have no choice but to tailor their productive activities to take account of the most excessive and burdensome version of state tort-law regulatory schemes. Thus, non-preemption should not be blithely equated with true federalism. In a national market, the common-law tort system itself shows scant respect for the autonomy of those states that choose to adopt more reasonable standards of tort liability in a vain attempt to avoid the disadvantages of over-deterrence. Where each state is already beholden to the whims and vagaries of judges and juries in other states, federal preemption does not shatter a perfect picture of states' rights.

Given these realities of our modern national economy and tort system, it is more important than ever that the federal courts vigorously police the boundaries between federal and state authority to regulate economic activity, because only if the courts are diligent in striking down excessive local regulation will this Nation's citizens continue to enjoy the fruits of a truly national economy that the Framers sought to obtain more than two centuries ago. Rather than weakening the doctrine of implied preemption out of manufactured concerns for "federalism," as petitioners and their amici would have it, the federal courts should instead redouble their vigilance in this area. Implied preemption is absolutely essential whenever state courts and local juries take steps to impinge upon the province of federal regulatory re-

gimes that enhance the efficiency and productivity of the national economy by providing consistent nationwide standards and implicitly displacing the hodgepodge of often-inconsistent local regulations and standards.

When federal regulators have made a considered determination about what specifications a product in interstate commerce must meet (after evaluating the costs and benefits to be borne by the Nation as a whole), it becomes especially likely that any stricter requirement imposed by an isolated state court or jury will not only spawn confusion but also be inconsistent with the needs and broader interests of the national economy. Although petitioners' amici argue that federal regulators are less able to impose appropriate safety regulations than are state court judges and juries (*e.g*, Leflar Br. 12-13), that contention is flatly inconsistent with the reality that federal agencies like the Department of Transportation are well suited to weigh competing interests and adopt appropriate and uniform national standards to govern particular aspects of the national economy. *See, e.g., Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983) (Congress adopted the Act and granted the Secretary authority to establish motor vehicle safety standards because "considerable expertise" is required to determine appropriate standards; "[b]efore changes in automobile design could be mandated, the effectiveness of these changes had to be studied, their costs examined, and public acceptance considered").

Indeed, federal agencies typically enjoy the benefits of specialized expertise and utilize procedures designed to ensure that they consider the views of all affected groups. As a consequence, uniform national standards adopted by federal agencies offer considerable advantages over the alternative mechanism urged by petitioners, namely, the continued imposition of arbitrary, unpredictable, inconsistent, and excessively strict *post hoc* standards selected on the basis of limited information by

state courts and juries. Far from adopting a stance of heightened judicial skepticism towards the doctrine of implied preemption, therefore, this Court should instead take this opportunity to reemphasize the need for, and the propriety of, strict judicial enforcement of uniform national standards in instances where, as here, those standards have been established by the federal agency charged by Congress with responsibility for promulgating uniform standards.

Petitioners and their amici make much of what they characterize as the "presumption" against preemption, but in reality there is no conflict between that "presumption" and the analysis set forth above. While this Court has traditionally approached every preemption case with an appropriate sense of respect for the authority of state governments within their spheres of responsibility, it is equally important to avoid frustrating Congress's purposes—and the overarching goals of the Commerce Clause—by eviscerating the benefits of uniform national standards that have been authorized by federal legislation and adopted by responsible federal agencies.

Properly understood, in fact, there is no meaningful "presumption" against implied preemption of state-law requirements that are inconsistent with uniform federal standards imposed pursuant to a comprehensive federal regulatory scheme. To be sure, this Court has stated that when Congress has "legislated . . . in a field which the States have traditionally occupied," the Court will "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), *quoted in Medtronic*, 518 U.S. at 485. But that background assumption has no force in an implied preemption case, because there can be no room for doubt that Congress intended to preempt inconsistent or conflicting state laws; indeed, the Supremacy Clause renders

all such laws null and void. U.S. CONST. art. VI, cl. 2. Accordingly, "[w]here, as here, the issue is one of an asserted substantive conflict with a federal enactment, then '[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail.'" *Brown v. Hotel & Rest. Empls. & Bartenders Int'l Union Local 54*, 468 U.S. 491, 503 (1984) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)); *accord, e.g., Felder v. Casey*, 487 U.S. 131, 138 (1988).

The "presumption" against preemption is doubly inappropriate in cases like this one that involve the clash between uniform federal standards and state tort suits because, as noted above, the modern tort system has been transformed into a full-fledged regulatory scheme that allows individual states (or, more precisely, state judges and juries) to exert power and influence far beyond their borders, undermining or eliminating the ability of other states to choose different, and less excessive, regulatory schemes. Thus, the argument that federal preemption of liberal state-law liability standards somehow threatens state sovereignty and requires a "presumption" against preemption has absolutely no force; state "sovereignty" is already undermined by the excessive regulatory schemes imposed by some states on the Nation at large, and the actions of Congress and federal agencies in promulgating uniform and balanced standards serve only to bring the federal system back into balance, as envisioned by the Framers when they granted Congress the commerce power more than two centuries ago.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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In The
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October Term, 1998

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Petitioners

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On Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE ATTORNEYS INFORMATION EXCHANGE GROUP AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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32 pp

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I. STATEMENT OF INTEREST

The Attorneys Information Exchange Group (AIEG) is an organization of attorneys who practice civil litigation throughout these United States. AIEG was founded in the mid-1970's by attorneys who were then representing burn victims who were motorists in Ford cars and trucks. Its founding members dedicated themselves, and this organization, to the creation of a private cooperative entity, which would serve to educate and coordinate the acquisition of technical information germane to the fair and honest representation of Americans who have suffered serious or catastrophic injury as a result of defective designs in motor vehicles. Over the years, AIEG members have represented the victims of such infamous vehicles as the Ford Pinto, General Motors cars and pick-up trucks with poorly designed fuel systems (e.g., side saddle fuel tanks), Audi vehicles with uncontrollable acceleration, and thousands of vehicles and trucks with transmission flaws allowing the transmission to unknowingly slip from Park to Reverse.

Members of AIEG on a daily basis are involved in pursuing products liability claims typically stemming from faulty design or manufacture of motor vehicles. Our clients are those Americans who have suffered catastrophic injury needlessly. In the prosecution of these common law claims, we are called upon to study and address the relationship between vehicular design, injury causation and any relevancy of compliance with federal standards promulgated pursuant to the Safety Act. *Most often, it has been found that there is very little relationship between a vehicle's compliance with these standards and the safety performance of these products in real world accidents.* AIEG's members have a vital interest in the effect this decision may have on its members and the clients they represent because motor vehicle manufacturers continue to produce vehicles which only meet the bare minimum federal safety standards, thereby resulting in the sale of vehicles which may not be reasonably safe. This circumstance allows some manufacturers to ignore their common law responsibility to build and sell crashworthy vehicles, and it has resulted in injuries and deaths to thousands of Americans

who should not have otherwise been injured or killed.[1]

II. SUMMARY OF THE ARGUMENT

In 1966, the United States Congress passed the National Traffic Safety Act (referenced as the Safety Act), in an effort to establish regulations for vehicle performance which would provide basic and minimum safety for vehicles sold in this country. Simultaneously, Congress authorized the establishment of a government agency to develop and promulgate these regulations--which became known as the National Highway Traffic Safety Administration (NHTSA). The legislators who passed the Safety Act in 1966 were quite aware of then existing regulations and standards which many of the states had promulgated, and which required automobile manufacturers to only sell cars in their respective states if these vehicles were equipped with certain devices, such as front seat seatbelts. Congress was asked by some facets of the motor vehicle industry and safety community to pass legislation which would have the effect of eliminating diverse state regulations, so that only one governmental agency would control the development and promulgation of standards which vehicle companies would be obliged to meet in order to market their products in this country. These standards were defined as "minimum standard[s] for motor vehicle performance."[2]

As the National Transportation Safety Board reported in 1970[3]:

> "The imposition of Federal Motor Vehicle Safety Standards for certain characteristics of vehicle safety insures that a particular level of safety will be universally applied, but it does not insure that the highest level of safety will be the standard, nor does it insure that the highest practical level of safety will be available to purchasers in the market."

At the same time Congress was writing this legislation, courts around the country and legal scholars were applying common law principles to the issue of a motor vehicle manufacturers' duty to build vehicles which are crashworthy. Larsen v. General Motors Corporation, 397 F.2d 495 (8th Cir. 1968). See generally, Hoening, Resolution of "Crashworthiness" Design Claims, 55 St. John's L.Rev. 633 (1981).

As a result of Congress' awareness of personal injury litigation invoking the application of the common law to motor vehicle design safety, and the promulgation of some non-uniform state safety legislation, the Safety Act addressed both issues. The Safety Act and its legislative history establish that Congress did not want conflicting safety regulations promulgated by state and federal agencies. This was made quite clear by the inclusion of a preemption provision; yet, Congress also specifically provided that the Safety Act would not undermine the common law:

> "While the federal statute under which these regulations were passed preempts inconsistent state standards, 15 U.S.C. § 1392(d), compliance with the federal regulations does not exempt any person from any liability under common law, 15 U.S.C. § 1397(c) (1966)." Dorsey v. Honda Motor Company, Ltd., 655 F.2d 650, 654 (5th Cir. 1981).

The preemption section of the Safety Act prohibits any state or political sub-division from establishing any safety standard dissimilar to published federal standards. Virtually every federal and state appellate court has concluded that the language and intent of the preemption section cannot be read to extend to common law

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[1] The parties have consented to the filing of Amicus Briefs. This Brief has been written only by counsel to this Amicus and no funds have been provided by anyone for its preparation or submission.

[2] 15 U.S.C. 1391 (2) (1966, 1988 & Supp. III 1991).

[3] *Special Study, The Roles of General Services Administration and Department of Transportation in Motor Vehicle Safety Standards*, Report No. NTSB HSS 70 1 (June 3, 1970), (see page 4).

damage claims. Unlike the language used by Congress in other legislation, here Congress expressed its intent to effect only the conduct of states and political subdivisions, rather than juries. In this instance, it is not just that Congress' statement of preemption does not mention common law, but rather that Congress specifically identified the state activity which it intended to preempt, i.e., activities of state and political subdivisions. And, Congress also expressed its intent to preserve the common law by stating that compliance with federal safety standards does not exempt any person from any liability under common law. 15 U.S.C. § 1397(c).

Congress intended by its language to establish minimum standards which all companies were required to meet before they can market their products in the United States. On the other hand, since these are only minimum standards, Congress intended the "threat" of common law liability to spur manufacturers to do much more than simply comply with federal standards--or suffer potential liability for injury caused by not providing the most reasonably safe product possible.

When Congress passed the Safety Act it did not establish any sort of administrative remedy for Americans injured by defectively designed and manufactured products, because it was then viewed that there were available common law remedies to address any such harm.

Over the past thirty years, the federal standards have, with few exceptions, not changed. A prime example of the stagnant nature of these standards is FMVSS 208. First promulgated as a "passive restraint" regulation in the early 1970's, the effective date of this standard was stalled, delayed, eliminated and then reissued many, many times. These delays often reflected the very political nature of the process of promulgating federal regulations. See, Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 163 U.S. 29, 103 S.Ct. 2856. Despite these delays in the effective date requiring passive safety features in vehicles, some manufacturers voluntarily produced and sold cars in this country with passive (air bag) safety systems. Car

companies including General Motors Corporation, Ford Motor Company, Mercedes Benz and Volvo Corporation introduced air bag systems in their vehicles long before they were required by FMVSS 208.[4]

Despite the relative stagnation of federal standards, vehicle manufacturers have continued to make safety improvements in their products. Obviously, technology and safety have been driven by the market place and the potential exposure to common law liability.

When Congress enacted the Safety Act it did not provide protection against common law liability--which would have essentially granted these corporations status as "protected" businesses. There was never any indication that Congress had any interest in precluding this facet of industry from the time tested criteria of "due care." Congress obviously appreciated the relationship between governmental regulation and our civil justice system, which provides all Americans with access to our courts to redress civil wrongdoing. Until the birth of "no air bag litigation," not one appellate court in this country had ever entertained the notion that Congress chose to preempt common law liability in the field of motor vehicle product design. The several state and federal appellate courts which have, during the past ten years, studied the question of federal preemption of "no air bag claims" have run the gamut on both their decisions and reasoning. However, one conclusion seems to be clear from all of these cases, including those finding some form of preemption: they have treated "no air bag claims" as a unique issue in the context of whether or not Congress or NHTSA intended or planned to preempt this specific common law claim. There has been no suggestion that a finding of federal

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[4] GM and Ford sold thousands of cars with air bags in the early 1970's. Unfortunately, because of poor sales, these two companies discontinued those safety features by 1976. Mercedes Benz and other European car companies began selling cars in the United States with air bag systems in the early to mid-1980's. The regulation at issue here did not require air bags or any passive restraint to be installed until the phase-in began in 1987.

preemption under these circumstances could just as easily be obtained in a case involving a common law claim that an air bag--or any other component that complies with federal standards--was defectively designed. Perry v. Mercedes Benz of North America, Inc., 957 F.2d 1257 (5th Cir. 1992).

When the Lower Court visited the question of federal preemption in this instance, it did so with a path of analysis which this Court provided in Cipollone vs. Liggett Group, Inc., 112 S.Ct. 2608 (1993), Freighliner Corporation v. Myrick, 514 U.S. 280 (1995), and Medtronic, Inc. v. Lohr, 116 S.Ct. 2240 (1996). Nevertheless, the Lower Court chose to ignore the *Express* statements of Congress, which preclude a finding of preemption, and instead the Court followed the path of implied federal preemption, finding that a "no air bag claim" would undermine and conflict with NHTSA's intent to provide manufacturers with several design choices to comply with FMVSS 208. We disagree with this conclusion. The Lower Court erroneously found implied conflict preemption on the basis that allowing this plaintiff's common law claim would force a manufacturer to install air bags, when the applicable standard gave manufacturers a choice between seat belts and air bags. This perceived "conflict" is not true. As was true in the case involving Karen Silkwood, here too, the manufacturer is not being forced to do any more than meet federal standards. All that may occur in a given case where a manufacturer has only complied with federal safety standards is that a jury may hold the company liable for not doing more than is required by government regulation.

At the heart of the rationale for finding no preemption of the plaintiff's claim, and the reason that courts throughout the country have, in increasing numbers, rejected this defense are the observations of the Missouri Court of Appeals:

> "[I]n the Safety Act, Congress put its statements about pre-emption in two statutory provisions, one of which we refer to as a pre-emption clause [15 U.S.C. § 1392(d)] and the other one of which we call a savings clause [15 U.S.C. 1397(k)]. Our terminology

> notwithstanding, both of the clauses are pre-emption provisions in the material sense of the word, because both clauses explicitly deal with the subject of what is and is not preempted.
>
> "This analysis is consistent with a basic rule of statutory construction that legislative intent is discerned by examining a statute's provisions as a whole..."
>
> * * * *
>
> "Clearly, Congress mandated in 15 U.S.C. § 1397(k) that the Safety Act was not to serve as a shield to any liability under common law..." Loulos v. Ford Motor Company, 882 S.W.2d 149 (Mo. App. 1994).

The Safety Act *expressly preserves* this plaintiff's common law action. The purpose of the Safety Act is to reduce accidents, deaths and injuries. The Safety Act authorizes the issuance of minimum standards. The Express Preemption Clause in the Act supports the conclusion that implied preemption is not warranted. That is exactly what Congress declared when it promulgated the Common Law Savings Clause in the Act. Thus, the presumption against preemption must prevail here absent a Congressional statement to the contrary.

Further, even without considering the effect of the Savings Clause, there cannot be implied "conflict" preemption here because the FMVSS does not require or prohibit specific equipment which the plaintiff alleges should have been installed; this common law action would not frustrate the purposes and objectives of Congress; and the NHTSA has not ordered manufacturers to refrain from using air bags as a supplemental safety system.

We ask the Court to establish for all litigants the clear proposition that because Congress never intended to preempt any common law remedy for defective design and manufacture, courts

cannot impose their will upon injured consumers and preempt these claims--despite a manufacturer's satisfaction of the minimum safety regulations. There is nothing unique about a federal minimum safety standard providing manufacturers with alternative means to satisfy a very basic level of crash safety, and allowing injured victims of non-crashworthy vehicles an opportunity to prove to juries that their injuries are attributable to a manufacturer's failure to go beyond the bear minimum in crash safety. In fact, such lawsuits can only serve to **promote** improvements in design protection.

The issue of design defect in relation to the question of compliance with a standard such as FMVSS 208 is not whether every person injured in every accident could claim that a different FMVSS 208 option should have been chosen in his or her car, and seek to punish the manufacturer for choosing an option federal law deemed acceptable to meeting certain safety goals. Rather it is whether Congress expressly intended to shield these manufacturers from tort liability when they do no more for safety than the bear minimum required by NHTSA. We think the answer to this question is quite clear: there is no immunity from common law liability for mere compliance with minimum safety regulations.

III. ARGUMENT

A. BACKGROUND

Nearly thirty years ago, the publication of Ralph Nader's Unsafe at Any Speed (1965) helped spur two major developments in the law. First, it prompted attorneys and the courts to give increased attention and recognition to what was then a relatively recent engineering development--the design of vehicles to be crashworthy. Second, it prompted Congress to give increased attention to the need for federal motor vehicle safety legislation and, ultimately, to the passage of the Safety Act of 1966. In the intervening years, as motor vehicle design defect litigation has grown, manufacturers have consistently argued to courts that when their vehicles have complied with applicable federal motor vehicle safety standards, they cannot be held liable for failing to do more. And, equally

consistently, courts have rejected that argument. Courts have uniformly stated that Congress meant what it said in 15 U.S.C. § 1397(c): "[c]ompliance with any federal motor vehicle safety standard does not exempt any person from any liability under common law." Larsen; Perry. The application of the common law to the field of automotive safety has, therefore, borne actions at common law for the deaths and injuries that the motor vehicle industry knew would result from their longstanding refusal to install safety devices, such as air bag systems. See, Motor Vehicle Manufacturers Association, ("[T]he automobile industry waged the regulatory equivalent of war against the airbag...[even though]...passive restraint could prevent approximately 12,000 deaths and 100,000 serious injuries annually"). Yet, during the past several years, the manufacturers have had success in convincing many courts that they should still not be held accountable for failing to install these safety systems in motor vehicles. Strangely, until this Court's decision in Cipollone, many courts "bought into" the argument of preemption advanced by the manufacturers. Only a few stalwart judicial defenders of Congress' obvious intent in the passage of the Safety Act were brave enough to "say no" to the rationale employed by many courts to preempt claims which Congress never intended to preempt. See, Gingold v. Audi-NSU-Auto Union, A.G., 567 A.2d 312 (Pa. Super. 1989); Loulos. Then, in the "no air bag" case of Tebbetts v. Ford Motor Co., 665 A.2d 345 (N.H. 1995), cert. denied (U.S. 1996)--decided shortly after Cipollone, the New Hampshire Supreme Court addressed Ford's argument that the plaintiff's claim was expressly preempted by the Safety Act as follows:

> "Although the language of the preemption clause alone might suggest that common law actions are preempted, we do not interpret the preemption clause in isolation. Rather we read the Safety Act as a whole, because 'the meaning of statutory language, plain or not, depends on context.' ...Hence we must interpret the preemption clause in tandem with the savings clause.

"The savings clause provides that 'compliance with any Federal motor vehicle safety standard...does not exempt any person from any liability under common law. ...It is difficult to imagine broader language.' ...We therefore conclude that state common law is not explicitly preempted..."[5]

Similarly, when General Motors raised the defense of express preemption to the plaintiff's no-air bag claim in Wilson v. Pleasant, 660 N.E.2d 327 (1995), the Indiana Supreme Court responded:

"...the presence of the savings clause negates any notion of express preemption of state common law claims. Therefore, we find that the Safety Act does not expressly preempt a state common law claim in this case..."

And, most recently, the Arizona Supreme Court rejected GM's arguments stating:

"In using the term 'safety standards,' Congress made clear just what it meant: 'Motor vehicle safety standards '*means a minimum standard for motor vehicle performance*, or motor vehicle equipment performance..."

These words tell us Congress gave the agency authority to adopt *minimum safety standards* to promote highway safety and reduce traffic accidents. Thus, we consider the standard as being just what Congress authorized: a minimum standard. If safety, not uniformity, is the underlying congressional purpose, the adoption of minimum standards would not ordinarily indicate that common-law liability imposed as a failure to adopt higher standards is precluded, or even in conflict with congressional intent." Munroe v. Galati, 938 P.2d 1114 (Arizona 1997).

[5] The Tebbetts case was tried to a jury and a verdict was rendered for the defendant Ford Motor Company.

B. THE SAFETY ACT SAYS THERE IS NO PREEMPTION

A reading of the Safety Act makes it clear that the preemption provision prohibits a state or political subdivision from establishing a "safety standard" that conflicts with a "Federal Motor Vehicle Safety Standard". Clearly, this phrase was intended to relate only to enactments of positive law, not common law liability. Cf. Medtronic at 2252 (citing other uses of the term "requirements" throughout a statute to demonstrate its focus is on the "enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries"). Thus, the only sensible reading of the Safety Act's preemption provision is that a "safety standard" promulgated under the Act will only preempt a state legislative or administrative "safety standard" that is not identical to the federal standard.

If Congress intended the preemption provision to apply to common law claims, it would have chosen words that clearly did so. The term "safety standards" is hardly a clear reference to common law claims. See, Medtronic.

Common law claims do not set specific minimum performance standards; they focus--as motor vehicle safety standards do not--on the *manner* in which a manufacturer has chosen to achieve a reasonable level of safety, and whether certain engineering features caused the vehicle to be causatively unsafe for the foreseeable events at issue. See, Silkwood v. Kerr-McGee Corporation, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).

The Congress intentionally defined a "motor vehicle safety standard" as a "minimum standard for motor vehicle performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." U.S.C. § 1391 (2). This definition plainly encompasses state statutory and administrative performance requirements and, just as plainly, does not encompass either state common law standards or jury verdicts which apply the common law in specific cases.

Finally, if Congress intended to preempt all common law claims which applied to the same manner of performance as these minimum standards, why include the Savings Clause? Such an interpretation would, by its terms, preempt virtually *all* common law claims which challenge vehicular design features that are covered by federal-minimum standards--including those claims routinely allowed by the courts over the past thirty years.[6] Hyundai Motor Company v. Alvardo, 974 S.W.2d 1 (Texas 1998).

C. THE COURT SHOULD ESTABLISH A CLEAR AND NON-INTERPRETIVE RULE THAT ABSENT A CLEAR STATEMENT FROM CONGRESS, STATE COMMON LAW CANNOT BE PREEMPTED BY FEDERAL LEGISLATION OR REGULATION

Our traditional state tort law is at risk from the Court's preemption doctrine. Year after year, this Court and lower courts have been increasingly called upon to decide whether an Act of Congress was intended to preclude civil liability at common law. Because common law actions have traditionally been preserved and entrusted to states' domain, we urge the Court to issue an Opinion which provides that state common law actions for damages receive the highest order of protection against preemption. It seems relatively easy to provide this protection if the Court will confirm that common law actions have minimal regulatory effect; if these actions have only incidental regulatory effect, then ambiguous preemptive language attempting to preempt some state regulation would not effect our citizens fundamental civil rights.[7] This approach would be one of a strict textualist and would ensure that

[6] See for example: Dawson v. Chrysler Corporation, 630 F.2d 950 (3rd Cir. 1980); Fox v. Ford Motor Company, 575 F.2d 774 (10th Cir. 1978); Sours v. General Motors Corporation, 717 F.2d 1511 (6th 1983).

[7] See, Goodyear Atomic Corp. v. Miller, 486 U.S.174, 185 (1988); English v. General Electric Co., 496 U.S.72, 85 (1990).

Congress rather than courts are assigned the task of overriding state common law.[8]

In the Lower Court, preemption was predicated upon first (relying on this Court's rationale in Myrick), concluding that even an express definition of the preemptive reach of a statute will not prevent a finding of implied preemption--it merely creates a reasonable inference that Congress did not intend to preempt other matters. After making that observation, the Lower Court then predicated its analysis upon the finding that "[t]he tension between 15 U.S.C. § 1392(d) and 15 U.S.C. § 1397(k) prevents the identification of any 'express definition' of the reach of preemption in the Safety Act." Having found no "express" intent of Congress, the Lower Court was "free" to ignore both the presumption against preemption and the "reasonable inference" rule established in Myrick. This somewhat convoluted rationale demonstrates the danger of allowing courts to define the scope of the preemptive effect of a federal statute on common law rights.

Because the decisions of this Court have not always provided a defining line between how one should construe a federal statute or regulation which effects common law rights versus state regulatory powers, it is time--we respectfully submit--to deal with this issue. A particular rule should be developed when the preemption of common law is at issue. We urge the Court to decide that *as long as the common law claim does not compel a manufacturer to engage in behavior barred by Congress or the relevant federal agency, a jury should be allowed to decide responsibility for harm caused.* See, Cipollone (Scalia, J., concurring in part and dissenting in part). The reason for creating a dichotomy between the interpretation of the effect of federal statutes or administrative rules on the common law versus state statutes or regulations is that unlike the kind of direct

[8] See, Raeker-Jordan, The Pre-emption Presumption That Never Was: Pre-emption Doctrine Swallows The Rule, 40 Ariz. L. Rev. 1379 (1998); Corboy & Smith, Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption, 15 AM.J Trial Advoc. 435 (1992).

legislative regulation undertaken by state legislators or regulators when a state seeks to regulate behavior or activities within its territory, the goal of the common law is to simply compensate an injured victim. A common law claim does not direct a defendant to do anything other than pay a verdict; there is therefore a stark difference between a state regulatory provision and a ruling requiring compensation for injury. See, Silkwood, supra. Allowing some "tension" between federal regulations and a common law claim for damages is hardly novel. Silkwood. We, therefore, urge the Court to conclude that common law actions should only be preempted when Congress has used the words "state common law" or "all state law" in an express preemption provision, or when "compliance" with the common law claim would cause a party to violate a federal regulation or standard.[9]

D. THE LEGISLATIVE HISTORY SHOWS THERE IS NO PREEMPTION

The Safety Act's legislative history confirms that Congress intended to preserve all common law claims.

1. The Senate Bill

The bill reported out of the Senate Commerce Committee, and passed by the full Senate, contained a preemption provision similar to the bill ultimately enacted into law. See 112 Cong. Rec. 14, 257 (1966). Senator Magnuson, the sponsor of the Senate bill, stated on the floor that:

> "Compliance with federal standards would not necessarily shield any person from broad liability at common law. The *common law on product liability still remains as it was*. 112 Cong. Rec. 14, 230 (1966) (emphasis added)."

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[9] See, Raeker-Jordan, The Pre-emption Presumption That Never Was: Pre-emption Doctrine Swallows The Rule, 40 Ariz. L. Rev. 1379, 1439 (1998).

2. The House Bill

The original House bill contained a preemption provision similar to the preemption provision in the Senate bill, and, like the Senate bill, it did not contain a savings provision. See H.R. 13228, 89th Cong., 2d Sess. (introduced on March 2, 1966). During hearings on that bill, however, Tom Triplett, an attorney from South Carolina, raised the following pointed concern regarding the possible effect of the House bill on the liability of manufacturers under state law:

> "We need a traffic safety agency and we need to research our problem from end to end, but we don't need to relieve the manufacturer of his natural responsibility for the performance of his product.
>
> "You may think that the manufacturer is afraid of Government regulation but the cry you are hearing may be 'Brer Fox, please don't throw me in the briar patch.' If the Government assumes the responsibility of safety design in our vehicles, the manufacturers will join together for another 30-year snooze under the veil of Government sanction and in thousands of courtrooms across the Nation wronged individuals will encounter the stone wall of 'Our product meets Government standards,' and an already compounded problem will be recompounded." *Hearings on H.R. 13228 Before the House Committee on Interstate and Foreign Commerce*, 89th Cong., 2d Sess. 1249 (1966) *("House Hearings")*.

Representative Farnsley, a member of the Committee, referred to Mr. Triplett's testimony a few moments later:

> "This gentlemen has raised, perhaps not brilliantly but I think well, [a] question... He said Brer Rabbit told Brer Fox, 'Don't throw me in the briar patch...'

"...Now the question is up: Is the manufacturer responsible for inherent dangerous design? If there are federal standards, this man has said this brings an absolute wall against those suits, and he feels that the manufacturers want these standards. I think maybe he has a point...

"[T]he courts, under the old common law and our statutes, hold them responsible. Now I think we should take a long time before we change that responsibility. I have talked longer than I intended to, but I feel this is very important." Id. at 1256-57.

Representative Mackay intervened to drive the point home:

"With regard to Title I, which I predict is going to be the real hard nut to crack in the minds of the committee because of its complexity, the agency bill provides for certification of vehicles that actually met *minimum* safety standards. This does not preclude building a car with higher standards of safety, *nor does it relieve makers of any legal liability whatsoever in terms of their obligation to the consumer*." Id. at 1260 (emphasis added).

Consistent with the foregoing, the House Committee amended the original House bill by inserting a savings provision identical in all respects to the savings provision ultimately signed into law. See 112 Cong. Rec. 19, 657 (1966) (emphasis added).

A tort judgment establishes only that a manufacturer failed to conform to a generalized standard of care, rather than establish an "objective criteria" for all products. Choosing its words carefully, there is no reason to find that Congress intended to alter the common law or its potential effect on car manufacturers. Hyundai Motor Company v. Alvarado, supra.

E. ANALYSIS OF FEDERAL MINIMUM

STANDARD 208

Given Congress' clear and unequivocal preservation of all common law claims, the history of Standard 208 is not particularly relevant to the preemption issue presented in this case. However, we briefly review Standard 208's long and convoluted history to make a critical point: not once in its "history" did the NHTSA suggest that Standard 208 was intended to preempt common law claims.

In 1967, the federal agency responsible for implementing the Safety Act--the National Highway Transportation Safety Administration ("NHTSA")--issued Standard 208, requiring all manufacturers to install passive restraints by the early 1970's. 32 Fed. Reg. 2408 (Feb. 3, 1967). After the Chairmen and Presidents of General Motors, Ford Motor Company and Chrysler Corporation personally met with President Nixon and John Erlichman in the Oval Office and complained about the agency's action, the President ordered the passive restraint requirement rescinded. See National Archives Transcript, "Part of a Conversation Among President Nixon, Lee Anthony Iacocca, Henry Ford II, and John D. Erlichman in the Oval Office on April 27, 1971, between 11:08 and 11:43 a.m."; 37 Fed. Reg. 3911 (Feb. 24, 1972). From 1974 through 1976, General Motors nevertheless manufactured 10,000 cars with airbags, but it did virtually nothing to market them; GM salesmen actually discouraged consumers who expressed interest in purchasing cars with airbags. See "Saga of the Air Bag, or the Slow Deflation of a Car-Safety Idea." *The Wall Street Journal*, November 11, 1976. Secretary Brock Adams issued a regulation requiring passive restraints in all large cars manufactured after September 1, 1981, and all cars manufactured after September 3, 1983. 42 Fed. Reg. 34289 (July 5, 1977). Seven months before the first deadline, however, new Transportation Secretary Drew Lewis delayed, and then rescinded, that order. 46 Fed. Reg. 12033 (Feb. 12, 1981); 46 Fed. Reg. 53419 (Oct. 29, 1981). In June 1983, this Court held that the rescission of Standard 208 by Secretary Lewis was arbitrary and capricious.

"For nearly a decade, the automobile industry waged

> the regulatory equivalent of war against the airbag and lost--the inflatable restraint was proven sufficiently effective... But the agency not only did not require compliance through airbags, it did not even consider the possibility in its 1981 rulemaking. Motor Vehicle Manufacturers Association, at 2869-70.

In July 1984, Secretary of Transportation Elizabeth Dole reinstated the passive restraint requirement, with a phase-in period beginning September 1, 1986, and full implementation required September 1, 1989. 49 Fed. Reg. 28962 (July 17, 1984). Secretary Dole went to some length explaining that the safest system was precisely the one that the plaintiffs seek to prove was an available, safer design in this case: "*...the most effective system is an airbag plus a lap and shoulder belt.*" Id. at 28986 (emphasis added). Nevertheless, concerned that industry opposition to an airbag mandate would lead the public to be unduly resistant to implementation of this "most effective system," Secretary Dole decided not to require only airbags in all cars. Instead, she ordered some form of passive restraints to be installed. Id. at 28963. In so doing, she explicitly noted comments that the auto manufacturers could be sued by crash victims who were injured because their cars lacked airbags:

> "Another potential source of manufacturer liability was raised by Stephen Teret, representing the National Association for Public Health Policy:
>
> "If a reasonable means of protection is being denied to the motoring public, the denial should lead to liability, even if the liability can be imposed on each and every car manufacturer. People whose crash injury would have been averted had the car been equipped with an airbag can sue the car manufacturer to recover the dollar value of the injury." Id. at 28972.

And, when confronted with criticism that the manufacturers would

use the cheapest system to comply with the automatic restraint system requirement, Dole said, "The Department does not agree with this contention. It believes that competition, *potential liability for any deficient system*, and pride in one's product would prevent this." 49 Fed. Reg. 29000 (1984) (emphasis added).

F. A FINDING OF PREEMPTION WILL ALLOW VEHICLE MANUFACTURERS TO ESCAPE LIABILITY FOR DEFECTIVE PRODUCTS THAT DIRECTLY CAUSE INJURY

The relief obtained by the Lower Court's ruling has cloaked the defendant vehicle manufacturer with immunity. If this ruling is correct then it can impart protection against common law liability in many other cases. A few examples will, we hope, suffice. In the mid-1970s, Ford Motor Company marketed the Ford Pinto. This car complied with one of the performance options of FMVSS 301. Nevertheless, consumers had every right to challenge the design of that product when they or their loved ones became involved in a fiery crash. Likewise, every car sold in this country by American manufacturers between 1975 and 1989 complied with FMVSS 208 by installing a lap belt only system in the rear seat. That installation satisfied one of the options of the latter standard. Nevertheless, the use of only a lap belt can, under forseeable circumstances, cause catastrophic injury--which is avoidable by the installation of lap and shoulder belt systems marketed by American manufacturers in their vehicles sold in other countries during this same time period. Should manufacturers be held accountable for neglecting the design of cars and trucks in this country because they complied with bare minimum safety standards?[10] Would such immunity further aid or

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[10] In the mid to late 1980's, there were hundreds of accounts of children and adults suffering spinal cord and head injury while lap seat belted in the rear seats of American made cars. Over the course of about 10 years, most of these Americans either went to trial or settled their products liability claims with the car companies. See, Garrett v. Ford Motor Co., 684 F.Supp. 407 (D. Md. 1987). During this period of time, these lap belt installations met one of the optional choices of FMVSS 208. Congress conducted special hearings regarding the safety of a

retard the express purpose of the Safety Act? We believe the answer is very obvious. In truth, allowing common law actions to challenge vehicle manufacturers who have merely met the bare minimum requirements of federal regulations serves to *compliment* rather than conflict with these standards. The common law serves to motivate manufacturers to build better and safer products--which was, of course, the true goal of the Congress which passed the Safety Act. A jury verdict that compensates a consumer for injury because a motor vehicle was built with the minimum safety in restraint, or poor fuel system integrity, or roof crush strength, or door latch security does not truly conflict with minimum federal standards. Instead, it asks that manufacturers be held responsible for injury caused because it did not design above these minimum criteria. Viewed as "complimentary" rather than conflicting, preemption cannot be obtained. Cf. Unum Life Insurance Co. of America v. Ward, 119 S.Ct. 1380 (1999).[11]

G. AN IMPLIED PREEMPTION ANALYSIS DOES NOT WARRANT THE FINDING THAT PLAINTIFFS' CLAIMS ARE IMPLIEDLY PREEMPTED BECAUSE THEY DO NOT CONFLICT WITH NHTSA REGULATIONS

Assuming there is a necessity to employ principles of implied preemption, there is no preemption here since plaintiffs' claims do not conflict with NHTSA's regulations. Plaintiffs do *not* contend that Honda should have chosen a different "option" under Standard 208. Rather, plaintiffs maintain that Honda should have

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standard only requiring lap belts, but before NHTSA announced its proposal to require lap/shoulder belts (already installed by European manufacturers), the American companies announced their decision to make this needed change. This course of events vividly demonstrated the societal importance of the common law.

[11] In the instant case, allowing for potential liability for not including both a seat belt and an air bag cannot be fairly viewed as creating a conflict rising to preemptive status. These restraints compliment each other to provide the safest means available today.

done more than meet the bare minimum required by the "option" it chose. Honda was plainly free to install an airbag--as a safety *addition* to the design of its product. Allowing a jury to decide if Honda is liable for failing to design a safe car without the addition of an air bag does not deprive Honda of the "option" it chose.

Any argument that the failure to install airbags would deprive Honda of its federally mandated "option" to choose among the design choices set forth in Standard 208 is wrong for two reasons. First, we need to be reminded that Congress did not entertain providing manufacturers with optional methods for complying with these minimum standards. That was an agency decision. Nevertheless, many federal vehicle standards permit design "options," some implicitly and others explicitly.[12] Nothing in the Safety Act or its legislative history suggests that the preemptive effect of a federal standard turns on whether it implicitly or explicitly permits such choices. Minton v. Honda of America, 684 N.E.2d 648 (Ohio 1997); Munroe, supra. As the Supreme Court of Indiana stated in Wilson v. Pleasant, 660 N.E.2nd at 339 (footnotes deleted):

> "Just as the Pokorny v. Ford Motor Company, 902 F.2d 116 (3rd Cir. 1990) court did not find establishing uniform national standards to be Congress's primary purpose in enacting the Safety Act, neither do we find encouraging flexibility and choice to be primary purpose... Congress declared the Safety act's purpose "to reduce traffic accidents

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[12] Standard 208 is not unique in explicitly providing optional means of compliance. See, *e.g.*, Standard 101 (controls and displays); Standard 105 (hydraulic brake systems); Standard 106 (brake hoses); Standard 108 (lamps, reflective devices, and associated equipment); Standard 111 (rear view mirrors); Standard 120 (tire selection and rims); Standard 125 (warning devices); Standard 201 (occupant protection in interior impact); Standard 202 (head restraints); Standard 203 (steering control system); Standard 205 (glazing materials); Standard 207 (seating systems); Standard 213 (child restraint systems); Standard 217 (bus window retention and release). 49 C.F.R. § 571.101 *et seq.* (1986).

and deaths and injuries to persons relating from traffic accidents." Congress thought that preserving common law claims would further that goal... Excising the effect of that provision from the Act in the name of providing manufacturers flexibility and choice in our view contradicts the primary purpose of the Act."

See also, Hyundai Motor Company v. Alvarado, supra. 974 S.W.2d at 11. The Congress that enacted the Safety Act was completely unaware of the methodology that NHTSA might employ in the future to avoid state agencies throughout the country from imposing different equipment regulations. Congress' concern was to provide for uniformity in government imposed regulations and nothing more.

> "...Congress gave the agency authority to adopt *minimum safety standards* to promote highway safety and reduce traffic accidents... If safety, not uniformity, is the underlying congressional purpose, the adoption of minimum standards would not ordinarily indicate that common -law liability imposed as a failure to adopt higher standards is precluded, or even in conflict with congressional intent." Munroe v. Galati, supra. 938 P.2d at 1118-1119.

In Myrick, this Court said that there was no conflict because "Standard 121 currently has nothing to say concerning ABS devices one way or the other, and NHTSA has not ordered truck manufacturers to refrain from using ABS devices." Id. NHTSA, of course, has not ordered auto manufacturers to refrain from using airbags either. Standard 208 does not impose any requirements "one way or the other" about the use of airbags--its just one option. Given NHTSA's recognition, however, of the benefits of airbag technology, it makes no sense to argue that plaintiffs' claims

frústrate purposes of the federal regulatory program.[13]

CONCLUSION

American common law is traditionally the guage of human decency and fair play. The common law allows average Americans, as jurors, to judge the actions or omissions of their fellow citizens. One can honestly say that without the common law many people would behave badly with impunity. Often, particularly when the acting party is a large business, inappropriate behavior goes without a remedy. Nevertheless, our common law gives each of us the opportunity to register our complaint and have our fellow citizens judge the rightness or wrongness of the conduct of another.

Compliance with the Safety Act and the minimum standards set forth therein allow automotive manufacturers to sell cars in this country--nothing more. The purpose of the Safety Act was to protect consumers, not to shield manufacturers from liability. To paraphrase Justice Blackmun's concurrence in Cipollone, by finding federal preemption of certain state common-law damage claims, the Court eliminates a "critical component" of the States' ability to protect the health and safety of its citizens. Thus, only when there is clear evidence that Congress intended such a result will preemption be found. Honda cannot demonstrate that Congress intended to displace our civil justice system as the forum for the resolution of the plaintiff's claims. The Safety Act means what it says: common law claims are not preempted. This Court should not condone preemption by regulatory fiat. Particularly when reliance upon such regulation can lead to the sale of a product which is not nearly as safe as one containing additional safety features. Congress did not

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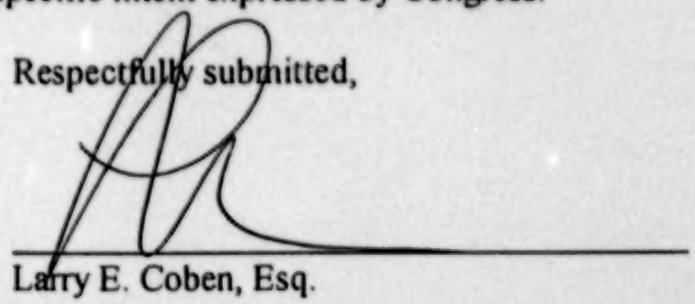
[13] One of the defendant's arguments or that of an Amici may be that Congress endorsed preemption by adopting the Intermodel Surface Transportation Efficacy Act. Congress did no such thing. It said the legislation "is not to be a 'sword' or a 'shield' in litigation or otherwise; and, it acknowledged the current status of cases going both ways on the issue of preemption. H.R.Rep. No. 12-404, 102d Cong., 1st Sess., at 401 (1991).

intend or expect that manufacturers would be able to escape responsibility for their conduct by hiding behind compliance with these minimum standards.

It is illogical, we submit, to contend that when NHTSA decided on three optional choices for compliance with FMVSS 208, it intended to ban lawsuits alleging cars or trucks or vans defective absent a supplemental air bag system. We know that Congress did not choose to occupy the field of tort law on this topic, and that conflict preemption is not appropriate.

For all of the reasons set forth above, this Court should reverse the decision of the Court of Appeals, and establish once and for all that state common law claims will be treated as off limits to preemption absent a specific intent expressed by Congress.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a the original *Brief of the Attorneys Information Exchange Group as Amicus Curiae in Support of Petitioners* was filed with the Clerk of the Court, sent via Overnight Federal Express, with a copy forwarded via Overnight Federal Express, this 19th day of October, 1999, to the following:

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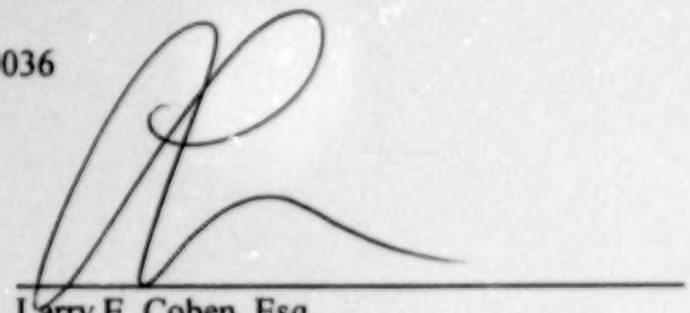

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